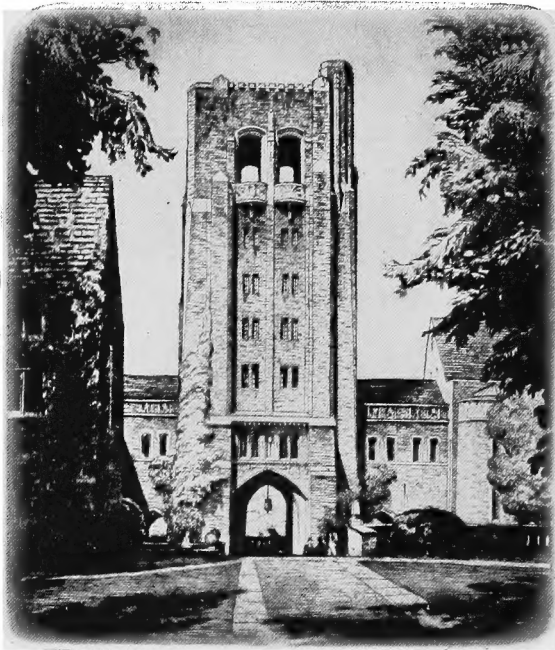


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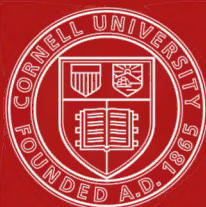
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PRECEDENTS

LEGAL AND COMMERCIAL

*A BOOK OF REFERENCE DEVOTED TO THE WIDE FIELD OF
COMMERCIAL LAW AND ITS MANY BRANCHES.*

WITH

NUMEROUS FORMS,

BY

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A COMPANION BOOK TO "COMMERCIAL PRECEDENTS."

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A VALUABLE ADDITION.

PREFACE.

THE objects of this volume are twofold. First, to put into the hands of business men, an intelligible statement of facts, showing the rules applied by the courts in the disposition of the numerous controversies which have arisen out of business transactions, in this country and in England, mainly within recent years. The cases stated are, with few exceptions, the latest decisions of the highest courts in the several states, of the United States Supreme, Circuit, and District Courts, and of the English High Court of Judicature. The aim has been to set forth the facts in such a manner as to render the decisions easily applicable by business men to the same set of circumstances occurring within their own experience. This method, the writers are quite aware, may lack scientific pretension, but its results may nevertheless serve a useful purpose in the hands of readers who it is certain will not, and in most cases cannot, give the necessary time to make a scientific acquaintance with the law.

The second object of the book is to make a digest of the facts of recent leading decisions, in a form to be of use to the legal profession itself, more particularly that part of it so situated as to be deprived of access to the wide range of current reports resorted to for the material of this volume. It is the experience of practitioners that digests are often untrustworthy guides, for lack of a sufficient statement of

the facts upon which the decisions were based. In going from the syllabus of the digest to the facts of the case itself it is often found that some controlling fact either appears or is lacking, and the presence or absence of this fact so distinguishes the decision from the case in hand as to render it worthless as an authority. The attempt is here made to give every fact which had a part in determining the decision.

Citations of authority will be found at the end of each case, and in many instances additional citations are appended for cases of similar import.

The common law is the guide, so that the decisions apply equally and alike to all states, save where a statute is quoted (as in the case of Assignments).

Cross references are used in the Index, at the end of the subject-matter, where found to be practical.

It should be said that a portion of the matter here offered to the public has already appeared in the columns of the *New York Journal of Commerce*, to which paper it was contributed by one of the writers hereof, in the course of his employment on the staff of that journal.

EDWARDS K. OLMSTED.

CHARLES PUTZEL.

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TO THE READER.

At the back part of this volume will be found a complete Index of the subjects treated in this work, also a Glossary of law terms, phrases and maxims.

The figures—indicating first the number of the volume, then the page—and other characters which appear at the end of each case, are reference marks to an authority where the reader can further pursue the investigation of the given case if desirable.

LEGAL AND COMMERCIAL PRECEDENTS.

ACCOUNTS.

Book Account may be Assigned.—W. & B., being indebted to W. P. & Co., gave them a chattel mortgage on their entire stock of goods, book accounts, moneys, credits, etc., and afterwards turned over the whole property, including the account-books, to the possession of the mortgagees. J. C. & Co. sued W. & B. to recover a debt to them, and caused a summons in garnishment to be served on several persons whose accounts were held by G. W. P. & Co. It is held that the garnishment proceedings could not be supported: “Now a debt due for goods sold and delivered, and resting for evidence on a book account, may be assigned, and such assignment is valid if made by mere delivery. Therefore, as W. & B. transferred to W. P. & Co. all their books of account as security to pay their indebtedness, and as said W. P. & Co. had possession of the same at the commencement of the attachment proceedings, the transfer or assignment to them was good, even if no chattel mortgage had ever existed.” (James Clark & Co. v. Win & Ballard, 34 Kansas, 553.)

Judgment for Part of Running Account Bars Recovery of the Remainder.—M. & Co. had a running account against C. for butcher’s meat, and a balance of \$160 being due sued for \$100, in a justice’s court, presumably to bring the suit within the jurisdiction of the justice. In a subsequent suit they sought to recover the remainder of the account, but were beaten. “The judgment of the justice is well pleaded in bar as a former recovery upon the same cause of action; for it is a general rule (in the absence of special facts to create an exception) that an indebtedness of his customer to a retail

dealer, upon a running account, furnishes one entire cause of action, and if such cause of action is split, and a recovery had upon a part of it, the judgment is a bar to any further recovery thereupon." (Memner v. Carey, 30 Minn., 458.)

Memorandum-Book Entries not Admissible to Prove Payment of Debt.—The administrator of one Corey, having been sued on a note of \$3,000, purporting to have been made by C., but believed by the administrator to be a forged note substituted for the genuine one, after it had been paid, offered in evidence, from his own custody, a small diary containing daily entries by C., including some showing payment of the note. It was admitted that this was not Corey's account-book, or book of daily charges, and there was no evidence, except from the date of the entries themselves, that they were made at the time they bore date. The entries were excluded, and in the opinion of the Supreme Court, rightly excluded, the court saying—"This was not an account-book, but a mere memorandum-book, and has no weight beyond any memorandum in writing made by C." (Costello v. Crowell, 139 Mass., 588.)

When Account Stated Deemed Conclusive.—"A settled account will be deemed conclusive between the parties unless some fraud, mistake, omission, or inaccuracy is shown." (Story on Equity Jurisprudence, sec. 527.)

When an Account Rendered Becomes an Account Stated.—"An account rendered shall be deemed an account stated from the presumed approbation or acquiescence of the parties, unless an objection is made thereto within a reasonable time." (Story on Equity Jurisprudence, sec. 526.)

Opening of Account Stated and Settled.—H. and J. had a running mutual account, which was adjusted and settled on the basis of a balance of \$54 found due to J. It was afterwards found that in consequence of error apparent on the face of the books, a balance was really due from J. to H., and the latter sued for and recovered the amount. The Court of Appeals, in giving its decision, announced the following principles: "In every such case there is an implied obligation upon both parties, *ex æquo et bono*, to rectify any mistakes

which may be discovered in stating the account, and an action at law will lie to recover the balance by reason of such a mistake, or to recover whatever appears to be due to the plaintiff upon a correction of the mistake. (Hanson v. Jones, 2 West. Rep., 611.)

Account Stated, when Binding on Debtor.—S. & Co., merchants in England, sold goods to F., of New York, and received sundry payments. On July 27th, 1880, they shipped him nine cases of goods, and subsequently rendered him an account made up to December 31st of that year, showing a balance due them of £1,160.08, and asking him to acknowledge receipt of statement, and transfer balance to the new account. F. did not comply with this request, but later told an agent of S. & Co. that he had remitted all but £40 of the account, and asked for a statement. After receiving it, January 15th, he remitted £500, and on February 21st another £500, writing at the same time as follows: "There are still a few pounds due you, providing the goods still on hand" (part of the nine cases shipped in July, 1880, not yet withdrawn from the Custom House) "are up to the contract. I shall withdraw them shortly, and determine all about it." On March 23d he notified S. & Co. that the whole lot was inferior to sample, and held subject to their order, on the payment of £847. 14s. 1d. as damages. F. had never raised any objection to the account rendered. The court said—"The sole question for our determination is whether there was an account stated. We think the court at general term did not err in holding there was. The goods had been subject to the control and inspection of the defendant for five months before he received the account. He had had four cases of of them in his actual possession for three months. The account was a short one, composed of few items. Immediately after its receipt he paid £500 thereon, a portion of which was necessarily applicable to the goods last shipped. More than a month later he sent another payment on the account, in which he acknowledged that there was a balance still due, provided the goods still on hand were 'up to the contract.' There was no express agreement upon the account by a mutual looking over of the same. But the law raises from

such facts an implied agreement to the correctness of the account." (Samson *et al.* v. Freeman, 7 N. E. Reporter, 419.)

Admission of Books as Evidence.—Entries When not Made Contemporaneously with Sale.—W., the assignee of Canfield & Sherwood, sued Michener, on a promissory note given in settlement of an account with C. & W. M. denied the debt, and the books of C. & W. were offered in evidence to prove the items. Sherwood testified that the entries were in the handwriting of himself and partner, principally in his own; that to the best of his knowledge and belief the charges were just and correct, and that they were made in connection with sales in the usual course of their business. Sales were made by each partner, and were usually entered temporarily upon slips of paper, and from them, soon after and ordinarily at the close of each day, at least, transferred to the day-book. He was generally present when business was transacted, but sometimes absent, and when absent, the books were posted by Canfield, apparently in the usual way. The sales made by Canfield, Sherwood used to enter each day from his memoranda. The Supreme Court held that as to his own entries certainly, and as to Canfield's presumptively, they were seasonably made, and the books were admissible as *prima facie* evidence of the debt. (Webb. v. Michner, 32 Minn., 48.)

Running Account.—Bar by Limitations Begins to Run from Last Item.—In an open account between S. & K., and J., the last charge made against J. was on August 30th, 1873, and the last payment, as claimed by S. & K., was made on June 21st, 1876. Suit was begun May 4th, 1881. After the last item was charged, K. took the account by assignment, the firm dissolving. All but one of the payments were made afterwards, and over a year and nine months elapsed between two of them. J. claimed that the debt was barred by the statute of limitations, but the Supreme Court held otherwise, and said that—"Taking those before and after and the whole together, and considering that all of the items have relation to the same open and continuous transaction between the parties, we are inclined to think there was no such break in

the account, or cessation of dealing as to cause the statute of limitations to commence to run before the date of the last item. We have held that the statute of limitations commences running from the last item in the account, whether it be on the debit or credit side thereof." (Keller v. Jackson, 58 Iowa, 629.)

Check in Payment of Balance Stated.—Conclusive Admission.—Pynchon had dealings with Day and another as stock-brokers, who rendered him statements of the purchase and sale of stocks as they were made, and monthly statements of account each month. When the account was finally closed there was a balance shown to be due Pynchon by Day & Co.'s books, amounting to \$2,511.01, for which they gave him two checks in settlement. At the time of passing the checks the accounts were not before Pynchon. The adjustment having been afterwards disputed and litigated, the court said—"Surely, under such circumstances the acceptance of the check as the payment of the balance most due upon the account must be taken as an adjustment of it." (Pynchon v. Day, Ill. Sup. Ct., 5 Western Reporter, 698.)

Copies of Account-Books not Receivable in Evidence.—In a disputed account between partners, one of the parties attempted to prove his claim by offering in evidence copies taken from the books of the firm. They were excluded by the lower court, and on appeal to the Supreme Court it was said—"We think the ruling is correct. The evidence was offered for the purpose of establishing the claim. The account consisted of a great number of items, and the transactions extended through a number of years. The books in which the accounts were kept could probably have been introduced; but copies of the entries were not competent." (Creswell v. Slack, 68 Iowa, 110.)

Presumption after Settlement as to Omitted Item.—Mason built and repaired certain salt-well machinery and fixtures for Peter, resulting in a series of charges and payments amounting to \$8,800 on each side. There was a dispute in settlement, regarding defective work, charges for repairs, the supply of better material than the contract called for, etc.,

and claims of damage and extra work were set up on either side. Finally, a certain sum beyond the contract price was agreed on, and a balance was struck. Afterwards there was another adjustment, and still later Mason made a claim of \$260 for repairing the first well constructed. On a reference the referee disallowed the charge, reporting that it was for repairs rendered necessary by defective work. On appeal to the Supreme Court the same conclusion was reached, the court saying—"We can see no reason for excepting this item of \$260 from the balances struck in the case, or for supposing it was not regarded as settled by the omission to name it in the compromise." (Mason v. Peter, 58 Mich., 554.)

Accounts Between Partners.—Interest not Allowed.—In a partnership accounting between S. and N., the former claimed interest on certain sums, which the Supreme Court disallowed, saying—"Interest can never be allowed on an unsettled or an unliquidated account without an agreement, express or clearly implied, and the case must be a very strong one when it is between partners to warrant its allowance without express agreement to that effect. We have been unable to find any understanding or agreement, either express or implied, by which either party was to be allowed interest for moneys owing to the firm from either, or from the firm to either, or from the one to the other, in the conduct and management of the copartnership business, before dissolution and final settlement; and in that case, until that time, neither is chargeable with interest on money he owes to the other or to the firm, arising out of the business transactions of the company. (Sweeney v. Neeley, 53 Mich., 421.)

Under Nebraska statutes interest on account does not begin to run until six months from date of last item. Lepin v. Paine, 15 Neb., 326,

Account Stated and Accepted, may be Disputed when.—2. Goodman sued Kennedy on promissory notes given to cover balance found due on open account between the parties. Goodman kept the account, made monthly statements, and at times, it seems, the partners looked over them together. After giving the notes Kennedy claimed errors and over-

charges. The Sup. Court said—"Merely giving the note therefor will not stop Kennedy from showing errors or overcharges, or a want of consideration. If we consider the account as having been stated by the parties there is a *prima facie* presumption in its favor, and it will not be disturbed except there was fraud or mistake in the settlement. But where fraud or mistake is shown the account will be opened and the errors corrected." (Kennedy v. Goodman, 14 Neb., 585,)

How Error in Account Stated may be Corrected.—Not Necessary to Re-open Whole Account.—Kent & Co. were commission merchants in New York, and sold grain for Carpenter & Co., of Chicago. They rendered an account, showing a balance due them of \$1,986.82. An item of this amount was a draft of \$1,550 charged as having been paid by Kent & Co. It was conceded on both sides that this charge was erroneous, though that fact was unknown to both parties at the time of settlement. C. & Co. disputed the account in other particulars, but finally offered to pay one-half of the balance stated. K. & Co. accepted, and gave a receipt in full of all demands to date. Thereafter C. & Co. discovered the erroneous charge. K. & Co. admitted the mistake, and offered to pay back with interest the difference between the \$1,550 and the amount they had received in settlement, going over the items of the account and making a new statement. C. & Co. objected to re-opening the statement and compromise, and demanded that the whole \$1,550 should be paid back. In this demand they were sustained by the judgment of the court, which said—"Where an account has been adjusted by the parties, if any mistake is subsequently discovered, the whole account need not be opened and re-adjusted, but the mistake can be corrected, and the rights of the parties re-adjusted to such mistake. Here, leaving every thing to stand just as the parties actually adjusted and settled the items of the account, there still remains due to the plaintiffs (C. & Co.) the sum which they claim in this action, and that sum they were entitled to recover, without opening the account." (Carpenter v. Kent, 5 North-Eastern Reporter, 787.)

Promise to Pay Account Stated Bars Corrections.—D. intrusted G. with property to be sold, proceeds to be invested for his benefit. On settlement D. claimed that G. owed him \$9,000, and though the latter disputed the amount an adjustment was made on that basis, G. making a written acknowledgment that such sum was due, and giving a written promise to pay it. He afterwards re-opened the dispute, denied his liability, and attempted to bring the items of the account again in question. The Court of Appeals, however, decided against him, saying—"It was no defense to this action for the defendant to prove that he did not owe the plaintiff any thing. The plaintiff having made a claim against him, and he having disputed it, and the parties having settled the dispute by agreeing upon the amount due in an account stated, which the defendant promised to pay, that promise is founded upon a sufficient consideration, and can be enforced against him, though he might be able to prove that nothing was, in fact, due from him." (Dunham v. Griswold, 100 N. Y., 224.)

Books of Account in Evidence.—How Accounts of Other Parties Protected from Inspection.—Day and another were brokers, who sold and bought stocks and bonds for Pyncheon, on a deposit of money as "margin," or security. Pyncheon sued to recover a balance claimed to be due him, and moved the court to order the production of the account-books showing all the dealings of Day and another during the period of their transactions for him. The court denied this, but on its own motion made an order which, after reciting that all the accounts relating to transactions between the parties were embraced in a certain journal and ledger, required them to be produced in court and placed in possession of the clerk. It further appearing that all of the ledger entries pertinent and proper to be examined were to be found on five named pages, it was ordered that the examination and inspection be restricted to those pages, and that the defendants be at liberty to seal up the remaining portions of the ledger. It also appearing that the journal entries of the transactions in question were so intermingled upon each page with entries of transactions with persons other than the plaintiff, that an

inspection of those pages would necessarily expose such outside transactions, it was ordered that the defendants be permitted to present in court, in lieu of the original entries, a verbatim copy of all journal entries relating to the disputed accounts, showing the pages where entered, such copy to be verified by the oath of the defendants, or one of them, and if requested by the plaintiff or his attorney to be further verified by certificate of the clerk of the court upon actual examination and comparison with the original entries. A somewhat similar order was made in regard to other books kept by agents of the defendants in New York. On appeal to the Supreme Court, the appellate tribunal affirmed the action of the court below, saying that its action was in conformity with the authorized practice in respect to the production of books generally. (*Pynchon v. Day et al.*, 5 Western Reporter, 698.)

Remittance of Check in full Payment of Account.—Credit as Part Payment.—Course of Debtor and Creditor Under Such Circumstances.—The facts of a case of frequent occurrence in business, decided in the British Supreme Court, Queen's Bench Division, are given in such detail in the opinion that the following extract will not require any further explanation,—except the statement that the plaintiffs, Ackroyd and another, were non-suited in the County Court, and the non-suit set aside by the Queen's Bench, and a new trial ordered. "It would appear," said Justice Cove, "that in the month of April, 1883, a sum of 76*l.* 1*s.* was, according to the view of the plaintiffs, due from Smithies to them. Smithies took another view, having, as he alleged, a claim for damages to set off against that sum, and sent to the plaintiffs a check for 36*l.* 13*s.* 6*d.*, with a statement indicating the view which he took of the account between them, and a letter showing that it was his intention that the check should discharge the whole of the amount due from him to the plaintiffs on the account. Now, what was the correct thing for the plaintiffs to do under those circumstances? I think that they took a very proper course. They replied to Smithies, saying that they could not adopt his view of the account, as, according to their view,

the amount due to them was 76*l.* 1*s.*, and not 36*l.* 13*s.* 6*d.*, and clearly offering to take the check 'on account,' leaving the rest open between them. Smithies then had two courses open to him: he might either have written to the plaintiffs telling them to place the check to his account and leave the question as to the balance for future settlement; or else he might have said that he sent the check in full satisfaction of his debt to them, and that if they refused to take it on those terms they must send it back. If Smithies had taken the latter course, and the plaintiffs had not sent the check back that would have been very strong evidence that they took it in satisfaction of the whole amount of the debt, and in some instances conclusive. But Smithies did not, in this case, take either of those courses. Instead of that he wrote a further letter, sending a further sum of money, so that it is quite clear he accepted the view of the plaintiffs to some extent. Whether he intended these two sums taken together to be in full satisfaction of the debt I do not know, but I do not think that the plaintiffs were bound either to send back the two checks, or if they did not, to have it taken against them that they accepted Smithies' view of the account. If the action for the balance had been brought within a reasonable time, the fact that the check was sent in full satisfaction of the debt would have been no answer at all. The learned county court judge has, on the contrary, held that it was a complete answer, and I am of opinion that he was wrong in so doing. Smithies offered the check in complete satisfaction of the debt, the plaintiffs rejected this, and made a counter proposal to keep the check on account. The *onus* was then laid upon Smithies to indicate his rejection of the counter proposal. I do not, however, find that he did so." (*Ackroyd v. Smithies*, 54 *Law Times R.*, N. S., 130.)

AGENCY.

Agent's false Representations, Scope of Authority.—A., a subscription-book agent, induced C. to subscribe, by making certain representations, as of his own knowledge, but which were false in fact, though he did not know them to be so.

The Supreme Court held it to be immaterial whether he did or not; and likewise whether his principal knew that he was going to make, or authorized him to make the representations. They having been made in the scope of the agent's employment, the principal was bound. (*Jewett v. Carter*, Mass., 1882.)

Application for Insurance.—Agent's Fraud.—Untrue statements in an application for insurance, fraudulently inserted by the agent, in place of the true answers of the assured, will not affect the policy.

S., an insurance agent, forwarded the application of E., a merchant, for a policy on his store. E. stated that the title was in his wife's name, and that the store had previously been on fire. The agent wrote that E. held the title in fee-simple, and that the building had never been on fire, with other untrue statements. A loss having occurred, the company contended that they were discharged from liability by the false representations of the application. The Supreme Court, however, held otherwise, saying that "the principal is bound by the acts of his agent, whilst he acts within the scope of his deputed authority." (*Elenberger v. Protective Mutual Fire Ins. Co.*, 89 Penn. State, 464.)

Investment by Agent of Principal's Funds.—Character of Security.—M. was an agent for W., a woman, and made a loan for her on a third mortgage. The mortgagor became insolvent, and the property sold for less than enough to pay the first two mortgages. The Court of Appeals thought the agent's conduct in loaning money on such security might well be questioned, and refused to infer W.'s ratification of the act from the mere receipt of money by her, the nature of the payment not being clearly apparent. (*Whitney v. Martine*, N. Y. Ct. Appeals, 1882.)

Agent to Sell no Power to Pledge.—No Lien on Wrongly Hypothecated Goods.—A. placed a piano and three organs with M., a dealer in such articles, for sale on commission. M. pledged them to G. as security for a loan. The question was, whether G. thus acquired a lien on the goods. The Supreme Court held that he did not, the principle being that an agent

or factor, though having possession with power of sale, has none to pledge. (*McCreary v. Gains*, Tex., Dec. 16, 1881.)

Authority of Real Estate Agent.—None to make Binding Contract of Sale.—McGee gave a general authority to Jackson, an attorney, to sell a specified lot of land. He sold it to Drury, receiving \$50 earnest, and giving D.'s agent a written memorandum of sale. On the same morning McGee himself, without knowing of Jackson's contract, sold the property to Ryon, and sent him also during the day a written sale memorandum. Afterwards in the evening of the same day, Jackson notified McGee what he had done, and McGee, as Drury claims, ratified Jackson's contract. It was difficult to determine whether Jackson's or McGee's own agreement was prior in point of time, but the Supreme Court thought it immaterial, because, as the court said, "We think that a general authority to an agent to sell real estate is simply an authority to find a purchaser, and is not an authority to conclude and execute a contract of sale which shall bind the principal." It was accordingly determined that Jackson's act in executing a contract of sale was a nullity, and even if ratified by McGee, as claimed, could not operate to nullify the intervening contract with Ryon. The agent, Jackson, performed his part, and was entitled to his commission when he found a purchaser, and this was both the limit of his obligation and his powers. (*Ryon v. McGee*, Dist. Col. Sup. Ct., Oct. 8, 1882.)

When Agent to Sell has Authority to Receive Payment.—Barry was a special agent of Meyer, Bannerman & Co., to take orders for goods by sample, receiving a commission on such orders. He did not handle nor control the goods. The orders were taken in the name of the firm; the goods were shipped directly to the purchaser, and a bill sent showing the amount of goods and indebtedness. He sold a bill of goods to Stone & Co., and a few days after the goods were received called upon them for payment. He made a small discount, received the money, gave a receipt in full in the name of Meyer, Bannerman & Co., but never accounted to them for the money. He was not authorized, but on the contrary was expressly forbidden to make collections or receive

payments from customers. The Supreme Court held, nevertheless, that Stone & Co. were justified in making payment to Barry, on the ground that there were circumstances or appearances which gave color to the belief that he had the right, and "when this is true," said the court, "it is immaterial as to third persons whether the authority has been actually conferred or not, for as to them apparent authority is real authority." This "color" of authority, amounting to a substitute for the real, and even overriding the actual prohibition of the principal, is derived by the court from the following circumstances: "The proof in this case developed the fact that it was a general custom for commercial agents, traveling like Barry, to solicit orders, to collect the purchase money for the goods sold by them for their principals, and the proof was specially directed to the custom of St. Louis agents. Isolated exceptions to the rule were proved, but in such instances the firm making the limitation indicated the fact in their bill or letter-heads that payment must be made to them directly. Proof was had of the fact of two other of appellants' salesmen traveling at the same time as Barry, both of whom were in the habit of making collections as Barry did in this instance, and remitting to the appellants. Barry himself, it appears, made collections from other customers of this house, and remitted the money to his principals from time to time, and no complaint was made by them of this exercise of authority, until his failure to remit the money paid him by the appellees. They did not before that time inform him or any one else that he had no authority to collect." (Meyer, Bannerman & Co. v. Stone & Co., 46 Ark., 210.)

The Supreme Courts of Illinois, Missouri, Wisconsin and Michigan, have held that salesmen employed by commercial firms to travel and solicit orders, or sell goods by sample, have no implied authority, where nothing more appears, to collect the purchase money due their principals. (Clark v. Smith, 88 Ill., 298; Butler v. Dounan, 68 Mo., 298; McKindley v. Dunham, 55 Wis., 515; Koseman v. Donham, 24 Mich., 36. Tennessee and Vermont decisions bear the other way.

Agent's Own Declarations not Proof of Disputed Authority.—
Building on Another's Land.—No Mechanic's Lien.—Proctor and Tripp furnished materials and labor in building a house, by order of Downing, on a lot in Peoria, owned by Downing's sister, Mrs. Tows, and sought to enforce a mechanic's lien against the building, claiming that Downing acted as his sister's agent, or at all events that the work was done and materials furnished with her knowledge and acquiescence. Tripp testified that Downing represented himself as her agent in bargaining for the materials, and read or told to him the contents of letters from her in relation to the matter. The account was entered on the books against Downing alone as Downing directed. Downing testified that he made the contract for the lumber in his own name, and did not represent himself as Mrs. Tows' agent. Mrs. Tows testified, "I never authorized Downing to act as my agent. * * * I sent him the money to put up a small rear building on said lot, to be used as a home for my brother. I never agreed to furnish any more money, and did not know anybody was putting a building on there upon my credit or the credit of my property. I never consented to any building being put upon my lot upon my credit." The Supreme Court held that under such circumstances a mechanic's lien against the interest of Mrs. Tows could not be enforced. Relative to the contradicted statement that Downing represented himself as her agent, the court said that, conceding such representations were made, "they prove nothing, for Mrs. Tows was not present, and is not shown to have ever approved of them or even to have heard of them. An agency cannot be proved by the mere declarations of an agent, when the fact of agency is in issue. * * * There is not only no actual, but no implied ratification of any act of Downing, in that respect, as the act of her agent, for an implied ratification must be based on a full knowledge of all the facts." (Proctor *et al.* v. Tows *et al.*, 115 Ill., 138.)

Declarations of Agent, How Far Conclusive.—In a suit between Baldwin and Winch, on a contract, the question was whether an act, the performance of which fell on B., had been done by Wakeman as his agent. There was evidence tending

to show the fact of Wakeman's agency, and certain statements and declarations made by him were admitted by the lower court, against Winch's objections. The Supreme Court, proceeding on the theory that the jury were satisfied that Wakeman was in fact B.'s agent, held that his statements made at the time of the performance of the act were correctly admitted, saying—"It will be conceded that the authority of the supposed agent cannot be established by his declarations; but if the agency has been otherwise proved, then we understand the rule to be that the declarations of the agent within the scope of his authority, which constitute a part of the transaction or *res gestæ*, are admissible." (Winch v. Baldwin, 68 Iowa, 764.)

An Agent Cannot Take Commissions From Both Parties.—B., a Washington real estate agent, was employed by Copeland to effect an exchange of his house with Carpenter, and charged him \$162.50 as commission on the exchange. Copeland ascertaining that Carpenter had paid \$250 as commission, resisted the demand against himself, and on trial the judge was asked to instruct the jury that if, without Copeland's knowledge, B. had acted as broker for Carpenter, and received compensation from him, Copeland could not be held liable to pay. The Supreme Court said on appeal that this instruction ought to have been given. "We all know," said the court, "that in the case of vendor and vendee the interests of the parties are antagonistic. A man who undertakes to act as agent for either, must promote the interest of his principal, and where he assumes to act for both he assumes conflicting duties. For this reason the Law frowns upon any such arrangement; although there are several cases in which a person may be broker for both parties. An auctioneer may act as agent for both parties, simply to sign the memorandum of sale required by the statute of frauds, and a broker to sign bought and sold notes; but it is clear that a man cannot act for two parties in consummating a sale or exchange, secretly receiving pay from both. If no money has been paid, I have some doubts whether, in such a case, the party can recover from either; but if money has been paid by either, then the rule is, that if an agent receives any profit in the business of

his principal, beyond his agreed compensation, he receives it for the benefit of his principal. Therefore, if a man acts for both parties, what he receives from one party is for the benefit of the other party, who is his principal." (Bates v. Copeland, Sup. Court. Dist. Columbia, 1878.)

Agent's Declarations Outside the Scope of his Agency.—Principal not Affected.—Goods sold by A. to S., under an agreement that they should remain the property of A. until paid for, were attached before that event as the property of S. The attaching creditor testified that B., who was A.'s selling agent in the place of S.'s residence, had told him that the goods belonged to S. B. denied making this statement. The Supreme Court held it to be of no consequence whether he did or not, as even if he did he went beyond the scope of his agency, and could not bind A. without express authority from him. (Skelton v. Manchester, R. I., 1879.)

Acts of General Agent Binding Principal, With or Without Authority.—Otherwise in Special Agency.—I. A. general agency exists where there is a delegation of authority to do all acts connected with a particular trade, business, or employment, and the principal is bound by the agent's contracts, though he violates his private instructions.

A special agency exists where there is a delegation of authority to do a single act. (Story on Agency, 17.)

PRINCIPLE.

Mr. Wait, in his work on Law and Practice, states the law as follows: "It is a universal rule, based upon principles of policy, propriety and justice, that if a principal puts his agent in a condition to impose on innocent third persons, by apparently pursuing his authority, the principal will be bound by his acts, and he must lose in preference to such third persons."

ILLUSTRATION.

Smith & Thompson employed Scott Carson to purchase wheat for them, at Cicero, Ind., on commission; they furnished him with the use of a warehouse and the grain sacks which belonged to one of them; from time to time they furnished Carson with money to pay for wheat by him purchased

and with newspapers containing the current market price of wheat, giving him instructions to buy for cash only. They frequently spoke of Carson as their agent, and during the nine months that he was engaged in buying wheat, he made contracts in the name of Smith & Thompson, gave receipts as their agent, and on all occasions held himself out as such agent. As such he bought of one Cruzan 260 odd bushels of wheat, and contrary to his instructions to buy only for cash, agreed to pay for it on demand the market price of such wheat at the time of demand. Cruzan, in good faith, believing that Carson was the agent of Smith & Thompson, sold the wheat on their credit, without any knowledge of their instructions to him, to purchase for cash only, and not on credit. The wheat was received into Smith & Thompson's warehouse, and was sold by them in the same manner as other wheat bought by Carson for them. They paid Carson for all the wheat put on the cars for them by him, and it did not appear in evidence that they knew of any having been bought on credit, though it was shown on the trial that Carson had purchased wheat of several other farmers, on the same terms and conditions, and the Appeal Court said they must have known that he had been buying of some person on credit, for they received more wheat than could have been purchased with the money they had furnished.

The court also said that if the facts above stated constituted Carson the general agent of Smith & Thompson they were liable to Cruzan for the value of the wheat, but if, under the facts stated, Carson was only the special agent of Smith & Thompson, then they were not liable.

It was held by the lower court that Carson had no authority to bind Smith & Thompson in the contract sued on, and it was not binding on them.

The Supreme Court, reversing the decision below, ruled as follows:

"We are very clearly of opinion that under the facts of this case Carson was the general agent of the appellees in the purchase of wheat; that his contract with the appellant was within the general scope of his authority and rendered his principals liable; that the facts that he had violated his pri-

vate instructions, and that the appellees had fully paid him for the wheat by him delivered to them, constitute no defense, where the contract was made, as in this case, in good faith upon the credit of the principals, and without any knowledge of the private instructions of the principals to the agent." (Cruzan v. Smith *et al.*, 41 Ind., 288.)

PRINCIPLE.

An agent personally liable though intending to bind his principal.

ILLUSTRATION.

In the following case there was a charter party between Captain Gyles P. Stone, part owner of the good ketch George, etc., Gyles P. Stone, master, on the one part, and Timothy N. Wood, "as agent of J. & K. Raymond." The charter referred throughout to Wood "as agent," and contained an agreement by him "as agent" to pay a certain sum to Stone in full for the freight, etc. It concluded with the signatures of the parties thus: "Timo. N. Wood, (L. s.), G. P. Stone, (L. s.)"

The freight being unpaid, Stone sued Wood for it, instead of J. & K. Raymond, and it was—*Held* by the court—"The question is whether the defendant is liable personally on this contract. That J. & K. Raymond are not liable on the contract there can be no doubt. When an agent or attorney contracts on behalf of his principal he must do so in the name of his principal or the latter is not bound. * * * There is no covenant on behalf of the Raymonds that they shall pay, but that the defendant as their agent, will pay. The words "as agent" do not constitute the defendant the agent of the Raymonds. At most they are mere description. * * In this case the covenant is the defendant's own." (Stone v. Wood, 7 Cowen, 453.)

PRINCIPLE.

The addition of the word "agent," "receiver," "treasurer," "cashier," "secretary," or the like, to the name of a party, signed to a contract, is regarded in law as merely *descriptia personæ*, and does not, in the absence of other *indicia* of intention, make the obligation that of the corporation or other person for whom the signer intends to act, but binds

the signer individually. "The effect of the authorities is clearly this, that where parties, in making a promissory note or accepting a bill, describe themselves as directors, or by any similar form of description, but do not state on the face of the document that it is on account, or on behalf of those whom they might be considered as representing—if they merely describe themselves as directors, but do not state that they are acting on behalf of the company—they are individually liable. But on the other hand if they state they are signing the note, or the acceptance on account of, or on behalf of some company or body of whom they are the directors and the representatives, in that case they do not make themselves liable when they sign their names, but are taken to have been acting for the company, as the statement on the face of the document represented." (Opinion of Chief Justice Cockburne in *Dutton v. Marsh*, L. R., 6 Q. B., 361.)

"The same strictness is not required in the execution of commercial paper as between banks, that is in other respects between individuals. The indorsement by a cashier in his official capacity sufficiently shows that the indorsement was made in behalf of the bank." (*Bank of Genesee v. Potihia Bank*, 19 New York, 312.)

And words absolutely importing a contract on the part of the principal are not always considered necessary. A bank check having the words "Ætna Mills" printed in the margin, and signed "A. B., Treasurer," was held by the Massachusetts Supreme Court to be an obligation of the Ætna Mills and not of A. B. The signatures "For A. B. by C. D.," "For Mistle, etc., Co., John Sizer, Secretary," "For David Perry, Joseph Talbot, Agent," have all been held good contracts of the principal, but there are conflicting decisions.

Diversion of Funds from the Purpose of the Agency.—Set-Off.
—A. commissioned B. by letter of attorney to collect certain moneys and apply them first to the payment of taxes and water rents, and then to the discharge of debts due himself by A. B. collected the money, and it being insufficient to pay the taxes and water rents, appropriated it wholly to his own debt. A. sued B. to recover the money thus appropriated

contrary to the tenor of his authority, and the Supreme Court held that B. was bound to disburse the funds in accordance with his undertaking as A.'s agent, and that he could not set up the debt due him as a set-off against A's demand. The court said that the receipt of money by one person from another, to be applied to a specific purpose, implies an agreement, on the part of the former, not to appropriate it to any other use, and of course not to his own by pleading a set-off. The debt not rising out of his agency lacks the mutuality which is essential to the right of set-off, and moreover, by accepting the special trust he waives the right. (*Tagg v. Bowman*, Penn. Sup. Ct., Feb. 9, 1885.)

Commissions.—Both Sides Paying.—A real estate agent, employed to sell or exchange certain land, effected an exchange with other parties by whom also he was employed. The principal was ignorant of this double employment, and on learning the fact refused to pay commissions. The broker recovered judgment, but on appeal the Supreme Court reversed it, saying—"There is some contrariety of decision in regard to the right to accept a double retainer and double pay, even when the fact is disclosed to both parties. But the cases are nearly, if not quite, uniform, that where the double employment exists and is not known, no recovery can be had against the party kept in ignorance, and the result is not made to turn upon the presence or absence of design, duplicity and fraud, but is a consequence of established policy." (*Scribner v. Collar*, 40 Mich., 1879.)

No Commission for Mere Introduction of Buyer to Seller.—W. & B., ship-brokers in Boston, introduced Dillaway, owner of the brig *Magnet*, which he wished to sell, to Gage, as a person who wished to buy. Gage afterwards bought the brig for \$2400, and W. & B. rendered a bill against Dillaway for two and one-half per cent commission on the price. They offered evidence to prove that it was a usage among ship-brokers in Boston to make such a charge in such a case. The jury were instructed that if the alleged usage was proved to exist, and Dillaway knew of it, it raised an implied promise

to pay W. & B. the commission. The jury rejected the claim, and on appeal to the Supreme Court, it was intimated that the only error in the charge was in requiring proof that Dillaway knew of the alleged custom. The court said—"We take the rule to be as applicable to a case like the present, that if the usage is so general, so uniform, and of such long continuance, that every ship-owner might be presumed to be acquainted with it, then the jury might infer the fact of actual knowledge" by Dillaway. Some question was made, whether a custom of the kind would be a reasonable one, but as the court saw no reason to distrust the verdict, no opinion was expressed on this point. (*Winsor v. Dillaway*, 45 Mass., 221.)

Commissions Payable by Usage.—Evidence of Trade Custom. If an agent cannot prove the amount of commission due him by special contract, he may show what is the customary commission paid in that particular trade, and recover at that rate.

Lyon was the agent in Baltimore of Scott & George, Pittsburg glassware manufacturers. He was unable to prove the special terms of his contract, though it was admitted that the rate of commission to be allowed him was five per cent. Scott & George claimed, however, on a final adjustment, that this commission was payable only on goods ordered through Lyon, or sold by him; while he insisted that he was also entitled to a commission on all goods sold by his principals in the territory of his agency, whether through his intervention or not. He offered proof that the agent previously employed by them in his district had been paid in this manner, and also that there was a uniform custom and usage among manufacturers of glassware to allow their local agents commissions, both upon goods ordered directly through such agents, and upon goods ordered by buyers, living in the territory of the agent, directly from the manufacturer. The Court of Appeals held this evidence admissible, in the absence of proof of a special contract, to show the amount of commission to which Lyon was entitled. (*Lyon v. Scott & George*, 44 Md., 295.)

ANIMALS.

Cruelty to.—Right to Destroy.—Under Code Miss., § 2918, forbidding cruelty to animals, defendant was indicted for killing hogs trespassing on his land after he had vainly tried to drive them away. Held, error to refuse to charge that if defendant killed the hogs while ravaging his crop, in order to protect the crop, and not from a spirit of cruelty, they should find him not guilty. (*Stephens v. State*, (Miss.) 3 South. Rep., 458.)

Injuries by Dogs.—In an action for damages for injuries resulting from being bitten by a dog, the evidence was that plaintiff was bitten by a dog which was then killed; that after its death it was identified by several persons as defendant's dog; that the dog had also bitten defendant's servant and the latter's wife. The defendant testified that he had a lot of dogs, which were kept chained all the time; that he did not attend to them personally, and had not heard that any of them had been killed, or his servant bitten; but none of his servants were called as witnesses. Held, that the evidence tended to establish that the dog belonged to the defendant, and that it was of a ferocious disposition, which, being known to defendant's servant, was known to defendant. (*Brice v. Bauer*, (N. Y.) 15 N. E. Rep., 695.)

Estrays.—Title of Taker.—On compliance with statutory requirements by a person who has taken up an estray, he acquires a qualified property in the animal, which becomes absolute on failure of the owner to appear and prove his claim within the time allowed by law; and, unless he is notified of the hearing of a claim interposed by the owner before a justice, so that he may appear and defend, his title is not divested by the proceedings. (*Stephenson v. Brunson*, (Ala.) 3 South. Rep., 768.)

The failure of an owner of an estray to pay the costs and legal expenses attending its keeping, before the expiration of one year, does not forfeit his right of property, where it is caused by the absence or other act of the taker, or other lawful excuse is shown. (*Id.*)

Estrays.—It does not affect the title of a person who has, under the estray laws, acquired title to an estray on his land, that the animal strayed from a thief who stole it from the owner, and did not stray from the owner. (*Kenney v. Roe*, (Iowa,) 30 N. W. Rep., 776.)

Trespassing.—The act of the legislature of Mississippi, approved February 15th, 1882, providing that owners shall enclose or herd their stock, and that animals found trespassing upon fields or cultivated lands may be taken up, sold, etc., is constitutional, the subject-matter being within the power and control of the legislature. (*Anderson v. Locke*, (Miss.) 1 South. Rep., 251.)

By the Georgia stock law provision is made for taking up and impounding animals running at large, and holding them until damages and cost of keeping and maintenance are paid, and a summary remedy for damages is given by proceeding before a justice of the peace; but this remedy is cumulative, and not exclusive, and it does not prevent a resort by the injured party to an action to test his rights in the ordinary courts of justice by a common law action for the trespass. Code, §§ 1435, 1449-1452, 1454, 5153. (*Bonner v. De Loach*, (Ga.) 2 S. E. Rep., 546.)

Priv. Laws N. C., C. 58, § 8, provides that a violation of the ordinances of a certain town should be a misdemeanor. The hogs of the plaintiff, a non-resident, had been impounded by the sheriff for running at large in violation of an ordinance, and plaintiff paid the penalty under protest, and sued the sheriff to recover it. Held, that he was not entitled to recover, and the sheriff could impound the hogs, whoever and wherever the owner might be. (*Rose v. Hardie*. (N. C.) 4 S. E. Rep., 41.)

Revised Stat. Ind, 1881, § 2639, *et seq.*, providing that any cattle found running at large on unenclosed lands or public commons in townships where the county commissioners have not by order permitted cattle to run at large may be impounded by any resident of the township, does not apply to trespassing cattle which have strayed from their owners; and whereas that statute (§ 2642) allows the impounder to

charge the owner \$1.50 per head when the latter is notified in writing, and immediately proceeds to retake possession, the impounder cannot demand that sum for estrays; §4815 providing that in case of strayed neat cattle, when the owner reclaims them before posting, the impounder can only demand twenty-five cents per head. (Jones v. Clauser, (Ind.) 16 N. E. Rep., 797.)

Trespassing.—Distress and Sale.—Under Code Iowa, § 1454, which provides that, when stock has been distrained for trespassing, the person doing it shall notify the township trustees to appear upon the premises and assess the damages. An assessment is void, though made by two or more trustees, if all of them are not notified. (Barrett v. Dolan, (Iowa,) 32 N. W. Rep., 189.)

Under Code Iowa, § 1454, providing that “if the persons owning * * distrained stock refuse to pay” the damages assessed by the township trustees, the stock shall be posted for sale, etc., the trustees may, when such owners have been duly notified of the time and place fixed for assessing such damages, proceed to advertise and sell without giving them notice of the amount of the damages assessed, or making a demand therefor. (Miller v. Dale, (Iowa) 34 N. W. Rep., 214.)

The damages which may be appraised and certified under section 2 of the New Jersey “act concerning trespasses by swine,” (Revision 20) are only such as have been occasioned by the swine at the time of the trespass for which they were distrained and impounded, and such as are visible to the appraisers, and can be determined without the intervention of proof by witnesses, etc. (Warne v. Oberly, (N. J.) 11 Atlantic Rep., 146.)

A justice of the peace who advertises and sells stock found trespassing upon fields or cultivated lands, under the act of February 15th, 1882, (Miss.) does not act judicially in the premises, and his proceedings are not vitiated by the fact that the person taking up the animals was his son-in-law. (Anderson v. Locke, (Miss.) 1 South. Rep., 251.)

Infections.—Where a railway company transporting through Kansas, cattle diseased with the Texas splenic or Spanish

fever, has its train wrecked so as to make it necessary to unload the cattle, and thereupon is notified that the cattle are from Texas, and will spread disease among the domestic cattle if permitted to run at large, or if driven upon the public highway, and drives the cattle, after receiving notice of their diseased condition, upon the public highway, it is liable, under Comp. Laws Kan., C. 105, § 60, for damages arising by the communication of the disease or fever to domestic cattle, provided the owners of the domestic cattle are not guilty of contributory negligence. (*Missouri Pac. Ry. Co. v. Finley*, (Kan.) 16 P. Rep., 951.)

Notice to train-men that cattle shipped on the train are diseased is notice to the corporation. *Id.*

One who, knowing that his cattle are infected with Texas fever, brings them into a state, and allows them to run at large on the range used by the cattle of another, is liable to such other for the damage thus caused, without regard to any statute prohibiting the introduction of such cattle and giving damages therefor. (*Kemish v. Ball*, 30 Fed. Rep., 759.)

In an action against a person who drives or causes to be driven into any county of Kansas cattle having the disease known as Texas fever, to recover damages for the communication of that disease, it is essential for the plaintiff to show that the defendant knew, or had reason to know, that the cattle so driven were diseased, or were liable to communicate the disease. (*Patee v. Adams*, (Kan.) 14 Pac. Rep., 505.)

Vicious.—Injuries by.—The owner of an animal which having no natural propensity to be vicious, commits an injury to the person of another, is not liable unless he had previous knowledge of the vicious disposition.

The fact that the owner of a dog permitted him to be at large on the highway when he inflicted the injury sued for, will not make the owner liable without proof of the scienter. (*State v. Donohue*, (N. J.) 10 Atlantic Rep., 150.)

NOTE TO THIS CASE.

A person bitten by a dog may recover damages where a previous propensity to bite mankind is shown, if it be also

shown that the owner knew of such propensity. (*State v. McDermott*, (N. J.) 6 Atlantic Rep., 653.)

But under the statutes of Wisconsin it is not necessary to prove that the owner knew the character of the dog. (*Mera- cle v. Down*, (Wisc.) 25 N. W. Rep., 412.)

In an action against the owner of a vicious bull for injuries sustained by plaintiff, it is not necessary to allege other negligence than the keeping of the animal with knowledge of its viciousness. (*Brooks v. Taylor*, (Mich.) 31 N. W. Rep., 837.)

The owner of a horse who has seen or heard enough to convince a man of ordinary prudence of its inclination to commit such injuries as those of which complaint is made, may be liable therefor, although he has no actual knowledge that it has before injured others in the same way. (*Reynolds v. Hussey*, (N. H.) 5 Atlantic Rep., 458.)

Bailment of.—One who takes cattle to pasture is bound to use reasonable and ordinary care to protect them from injury; and if the plaintiff claims that his cattle were injured by the negligence of the agister, the burden of proof is upon him to show such negligence. (*Wood v. Remick*, (Mass.,) 9 N. E. Rep., 831.)

Where a bill of particulars alleges that defendant contracted to take good care of stock plaintiff entrusted to his keeping, such pleading states a contract for only ordinary care, and where the bill further states that the said stock sickened and died for want of proper care, it is error to admit evidence of a contract for special and extra care of said stock, and to instruct the jury what the duty of the defendant would have been if they should find that special and extra care had been contracted for. (*Ransom v. Getty*, (Kan.,) 14 Pac. Rep., 487.)

Cattle Brands.—The record of a brand of stock in the office of the clerk of the county is not constructive notice that an animal so branded belongs to the owner of the brand. (*Stewart v. Hunter*, (Oregon,) 16 Pac. Rep., 876.)

Recording Brand.—A creditor claiming property rights in cattle running on a range purchased of his debtor by paying partly in cash and partly by crediting the debtor with his account, without recording the transfer, acquires no title

under Rev. Stat. Texas, Art. 4564, providing that stock animals moving in a range may be disposed of by sale and delivery of the brands, but in every such case the purchaser in order to acquire title thereto shall have his conveyance recorded. (*Black v. Vaughan*, (Texas,) 7 S. W. Rep., 604.)

Under Pen. Code, Texas, Art. 738, providing that before any brand can be recorded it shall designate the part of the animal upon which it is placed, a record of a brand showing that it was placed upon the hip, thigh, and flank, without stating on which side it was placed, is sufficient and admissible in evidence to show ownership. (*Thompson v. State*, (Texas,) 7 S. W. Rep., 589.)

Texas Fever Act.—In an action under Comp. Laws Kan., 1885, C. 105, § 80, for damages for illegally driving cattle into the state which communicated the Texas fever to the plaintiff's cattle, and to have the damages declared a lien on the cattle, the purchasers of the cattle who have assumed the liability for damages are properly joined as defendants, and personal judgment may be had against them as well as against the vendor. (*Woodrum v. Clay*, 33 Fed. Rep., 897.)

Condemnation and Destruction.—Due Process of Law.—Rev. Stat. Maine, C. 124, § 42, authorizing an officer or agent of a society for the prevention of cruelty to animals to condemn, cause to be appraised and destroyed, an animal, without notice to the owner that he might appear and be heard, is unconstitutional. (*King v. Hayes*, (Maine,) 13 Atlantic Rep., 882.)

ASSIGNMENTS.

Identification of Assigned Stock of Goods.—Sufficient Description.—Assignment takes Effect from Delivery of Assignment Deed.—A deed of assignment describing the property assigned as "my stock of goods now on hand in store in the building on Main street, in Council Grove, Morris county, state of Kansas, and in the frame store dwelling on Main street, in Winfield, Cowley county, state of Kansas, where I now do business," was attached as invalid for want of sufficient certainty in the description, but the assignee had no difficulty in finding

the property, taking this fact into consideration. The Supreme Court pronounced the assignment good. It was drawn and acknowledged June 19th, but not delivered until July 2d following, and the court held that it took effect on the latter date, and not before. (*Walker v. Newlin*, 21 Kan.)

Surviving Partner may make a Firm Assignment.—B. and M. constituted a mercantile firm doing business in Arkansas as A., B. & Co. B. died, and M., two months thereafter, executed a general assignment, for the benefit of creditors of all the firm assets, and “all the property belonging to him as such surviving partner.” Several creditors were preferred, and he omitted from his schedule, and appropriated to his own use a portion of the assets belonging to him as surviving partner. S. & Co., preferred creditors, attached the assigned effects for their own benefit, alleging the invalidity of the assignment, partly on the ground of the fraudulent omission of assets. The United States Supreme Court, on the latter point, said that if the preferred creditors were not privy to the fraud it was valid as to them, and on the question of a single surviving partner to assign the firm effects, said—“As, with the concurrence of all the partners the joint property could have been sold or assigned, for the benefit of preferred creditors of the firm, the surviving partners—there being no statute (in Arkansas) forbidding it—could make the same disposition of it. The right to do so grows out of his duty, from his relations to the property, to administer the affairs of the firm so as to close up its business without unreasonable delay; and his authority to make such a preference—the local law not forbidding it—cannot, upon principle, be less than that which an individual debtor has in the case of his own creditors. It necessarily results that the giving of preference to certain partnership creditors was not an unauthorized exercise of power by Moores, the surviving partner.” (*Emerson v. Senter*, 118 U. S., 3.)

Fraudulent Transfers before General Assignment.—Right of General Assignee.—E. S. executed a chattel mortgage on his stock in trade, but continued in possession for a period, when the mortgagees took possession and sold the goods at

auction. Before the sale E. S. made a general assignment for the benefit of creditors. The assignee brought an action against the mortgagees to recover the value of the stock, alleging that the mortgage was fraudulent, and the jury found that such was the fact. The assignee therefore had a verdict for the value of the stock, costs and damages, in all amounting to \$5,171.86. On appeal, the Supreme Court reversed the judgment, and ordered a new trial. The mortgagees having taken possession before the general assignment, the court said, "as the possession of the mortgaged property was not in the mortgagor at the time the assignment was made, no such title passed to the assignee by the assignment as will enable him to maintain an action at law for the alleged conversion thereof. * * It has been twice decided by this court that the assignee under a statutory assignment for the benefit of creditors cannot question a transfer of property which the assignor himself cannot question, no matter how fraudulent such transfer may be as to the other creditors of the assignor; and we are not disposed to re-open the controversy upon that question, believing that it is sustained upon principle and authority." The court pointed out that under Chapter 170, Wisconsin Laws of 1882, the assignee might have brought a bill in equity to set the fraudulent mortgages aside, and to subject the property as far as might be necessary to the trusts of the assignment, but no further. In such a proceeding the assignee represents only the creditors, and a judgment in excess of their claims, as was rendered in the case under consideration, would not be permissible. (Klœckner, assignee, etc., v. Bergstrom, 30 North-Western Reporter, 118; Wis. Sup. Ct., Nov. 3, 1886.)

Continuance of Business by the Assignee.—Employment of the Assignor as Clerk.—C. Y., a merchant, made an assignment to W., who notified the creditors of his intention to continue the business, and to pay them as fast as sales and collections would permit. In order to make the stock available, he at the same time solicited them to make further sales to him, of such goods as he might from time to time require.

B. and others, creditors, assented to this arrangement. The business was carried on in this way for about eight months, when B. and others brought a personal suit against C. Y., to recover a balance due on the old account, and another against C. Y., and W. jointly for the amount due on purchases made by the assignee to replenish stock. In the litigation which ensued the validity of the assignment was impeached, the allegation being that it was made to defraud creditors, and that it was not accompanied by an immediate and continued change of possession of the assigned property, as required by law. The Supreme Court said—"The evidence, however, tends to show such a change of possession. The fact that C. Y. remained in the store, as clerk or agent of the assignee, was not conclusive evidence of fraud, nor necessarily inconsistent with the good faith of the transfer, or the possession of W. as assignee. These questions were fairly submitted to the jury upon the evidence, and the jury were cautioned by the court, that if they found that his (C. Y.'s) employment was merely colorable, and intended to give him the management of the property for his own benefit, then it was a fraud upon his creditors. It was irregular for the assignee to continue business as he did, but there was evidence sufficient to justify the jury in finding that the defendants (B. and others) were notified of his manner of conducting the business, including his plan of purchasing new goods, and incorporating them with the old stock on hand, they receiving payments from time to time out of the proceeds of the stock so intermingled, and that they acquiesced therein, and waived such irregularity. (*Noyes v. Beaupre*, 30 North-Western Reporter, 1 Minn. Sup. Court, Oct. 13, 1886.)

Property in Different States.—How Assignment Operates.—As to Real Estate.—M. recovered a judgment against C. in the state of New York, of which both were residents. C. had previously made an assignment for the benefit of creditors, with preferences. He also executed a deed to his assignee of land owned by him in Iowa. M. filed his claim with the assignee, and became the assignee's bondsman, but also got judgment in Iowa, and levied on C.'s land there. On the part of C. and

his assignee it was contended that M. had estopped himself from disputing the validity of the assignment, and moreover, being valid by the law of New York, it conveyed the land in Iowa. On both grounds the Iowa Supreme Court sustained the opposite conclusion, denying that there was any estoppel, and on the other point using the following language:

“This court held, twenty-eight years ago, that the validity of an assignment of real property situated in this state, for the benefit of creditors of the assignor made in another state, must be determined by the laws of this state; and if such assignment gives preference to creditors, it is void as to the real property within this state covered by the assignment. This decision is based on the familiar rule of the law, that the validity of conveyances of real estate must be determined by the *lex loci rei sitæ*. The fact that the plaintiffs and defendants were all residents of New York does not modify the rule, and require the application of the law of that state to the transaction.” (Moore v. Church, 30 North-Western Reporter, 885.)

If Valid in State Where Made, Assignment Will Convey Personal Property in Another State.—I. B. & Co., doing business in New York City, made a general assignment, with preferences, to W. J. O. The J. M. A. Co., warehouse men, of Kentucky, having a quantity of whiskey belonging to I. B. & Co., in their warehouse, attached it for debts due by I. B. & Co. to them. The question was, whether the attachment would hold against the assignment, and the United States Circuit Court, district of Kentucky, held that it would not. It was contended on the part of the J. M. A. Co. that the assignment, though valid by the law of New York State, was fraudulent and void by that of Kentucky, because of the preferences given to certain creditors. But the court pointed out that the assignment was not necessarily void in Kentucky for that reason, and referring to the act of 1856, said the deed would be given effect as a general assignment without preferences, if within six months a petition was filed by a creditor. “The courts have declared that the act has no effect unless a petition is filed within six months. If a petition is not filed

within the time prescribed by the act, deeds of assignment giving preferences, as between creditors, are valid. * * * If, therefore, I. B. & Co. had executed this deed of assignment in Kentucky, it would not have been void, and would only have operated as a general assignment for the benefit of all their creditors in the event a petition had been filed within six months; and plaintiff could not have obtained a preference by the levy of an attachment on the assigned property at any time. The act of 1856 does not, we think, furnish a good reason for declaring this assignment, made in and according to the laws of New York, should be held invalid, and thereby giving the plaintiff a preference over other creditors." (J. M. Atherton Co. v. Ives, 20 Fed. Rep., 20.)

Specific Lien of Creditors on Assigned Stock in Trade.—Goods Fraudulently Bought by Insolvent.—Title Remains in Vendor.—Brown Bros. were dealers in dry goods and general merchandise at Fort Vorley, Ga., and on October 17th, 1885, they made an assignment, having previously by several mortgages to wives and other relatives of the firm, attempted to cover nearly their whole stock in trade. The mortgages included one to H. C. Harris, the assignee, and had been generally made long before, but recorded only three days before the assignment. There were other evidences of deliberate fraud, such as the fact that the firm had gone through their books, marked their large solvent debts as paid, and deposited the notes therefor with their brother and banker for their own benefit. Several creditors of the firm,—Jaffrey & Co., Hochstadter Bros., Lyon & Co., and W. R. Singleton & Co.,—filed bills against Brown Bros., their assignee, their wives, and other relatives who held mortgages on their stock, to set aside the assignment and mortgages, to enjoin all parties from proceeding under the assignment, and to obtain the appointment of a receiver, with an order that such receiver should keep the goods bought from the creditors named separately from the rest, and that the proceeds arising from the sale of such goods be specially appropriated to pay their claims for the purchase money. A receiver was accordingly appointed, and the entire cause was referred to a master, who reported

that the assignment was void, and some of the mortgages void but others valid. The claims in suit were also recognized as valid, but the demand that the fund arising from the sale of the goods should be specifically appropriated to the creditors who sold the goods to the firm was disallowed, and the claimants placed on the footing of general creditors. In support of this conclusion, the master found that Brown Bros. were not insolvent when they made the purchase. The claim of Jaffrey & Co., Hochstadter Bros., etc., was based on the ground that Brown Bros. were insolvent at that time, and had neither the ability nor the intention to pay, but induced the owners to part with the property by false and fraudulent statements. They therefore urged that no title passed by the sale. In examining the soundness of the master's conclusion, the court cited the case of *Landaner v. Cochran*, 54 Ga., 533, where the Supreme Court held "that where goods are obtained from a party by fraud no title passes, and the right of the vendor to retake the same by a claim is superior to the lien of an attachment against the fraudulent vendee levied at the instance of one of his creditors. * * * *

It appears from the evidence that Emile Brown, one of the firm of Brown Bros., for the purpose of obtaining credit from Jaffrey & Co. and Hochstadter Bros., gave them a statement of the financial condition of the firm, and referred them to a statement previously made to Bates, Reed & Cooley, all showing a prosperous solvency. Reference to the numerous mortgages to various relatives of the Brown Bros. and to H. C. Harris was studiously avoided. No reference was made to the indebtedness of Harris. When Harris was telegraphed an inquiry about their solvency he replied with vague generality, but made no mention of his liens on their stock. It was their duty to disclose the existence of these incumbrances. Such suppression of important facts when direct inquiry was made was actual fraud. The New York merchants were entitled to know of the existence of these mortgages. It is not to be supposed that had they known what a cloud rested on the prospects of the house of Brown Bros. that credit would have been extended to them. The concealment of material facts, which the vendor was entitled to know, was fraudulent,

and in this case will vitiate the sale." The report of the master was modified accordingly, allowing the creditors named to take their distributive shares of the fund before the general creditors. (1886, *Jaffrey v. Brown*, 29 Fed. Rep., 476.)

Meddlesome Interference With Assignee's Sale.—Damage to Assets Recoverable from Defaulting Bidders.—In the case of *Jaffrey v. Brown*, (29 Fed. Rep., 476,) where the stock of an insolvent firm, accused of making a fraudulent assignment, was on sale by the receiver, Brown, a member of the firm, and Baer, a creditor, were charged by the receiver, in a petition to the court, with meddlesome interference and unwarrantable officiousness at the sale, whereby, in connection with their refusal to take and pay for the goods bid off by them at seventy-one cents on the dollar, they occasioned a loss to the fund. The court, in making a decree for the distribution of the fund, gave judgment on this branch of the case as follows:

"The master finds the precise amount \$1,576, and finds a liability against them for this amount. Baer denies the facts, and there is in relation to this issue much conflicting evidence. I think, however, that the preponderance of the proof is sufficient to warrant the court in finding that Baer and Gustave Brown had arranged to bid off a portion of the stock indicated by the receiver, that Brown did the bidding and that they afterwards refused to comply with their bid, causing the receiver to resell at the reduced price of fifty cents on the dollar. These meddling persons are parties to the bill. They are—and were at the time before the court—one as a complainant and the other as a respondent. They assert the validity of their claims against the fund which by their interference is reduced in an amount greater than the sum of their demands. There had been a valid and *bona fide* bid of seventy cents before their pretended bid of seventy-one cents. Can it be possible that the court is powerless to protect the fund in its custody from such reckless and damaging conduct by and at the instance of parties to the record before it? I think not. Messrs. Baer and Brown, in the opinion of the court, are jointly and severally liable to the receiver for the full amount of the damage occasioned by their conduct."

Assignments (ALABAMA).—Assignments for the security or benefit of creditors are governed by the common law, with the exception that a general assignment, defined by the courts as a transfer, by any form of instrument, of substantially all the property of a debtor subject to the payment of debts, for the security or payment of debts, inures to the benefit of all the creditors of the grantor equally. (Code of Ala., § 2126.) It inures to the benefit of the existing, not of the subsequent, creditors of the grantor. The assignment is not by the statute rendered fraudulent or void; the preference of creditors is blotted out, and it remains a security, or trust, for all creditors. Sales, absolute and unconditional, in payment of debts, are not within the statute. Nor are liens acquired by operation of law. Several successive conveyances of substantially all the property of a debtor may, if their execution was within the contemplation of the parties, be taken as one instrument, and operate a general assignment.

Mortgages, or other transfers, made for the payment or security of debts contemporaneously contracted, prior to the 23d of February, 1883, are within the operation of the statute.

The statute was, on the 23d of February, 1883, amended, by declaring that it "shall not apply to or embrace mortgages given to secure a debt contracted contemporaneously with the execution of the mortgage, and for the security of which the mortgage was given." (Pamph. Acts, 1882-83, p. 189.)

Mortgages or other security for debts are fraudulent and void as to creditors of the grantor when any creditor provided for thereby is required to make any release, or to do any other act impairing his existing rights, before participating in or receiving the security therein provided for him." (Code of Ala., § 2125.)

An assignee in a general assignment for the benefit of creditors is not regarded as a purchaser for value, or the representative of creditors; he is bound and affected by all the equities, and subject to all the defenses, which would have bound or affected the assignor.

Assignments (ARIZONA).—**INSOLVENCY—Voluntary.** Every insolvent debtor, owing debts exceeding three hundred dollars, may petition the district court of the county where he has resided six months next preceding the filing of petition, to be discharged from his liabilities. This petition must be accompanied by a schedule and an inventory of all debtor's assets and liabilities, and a very stringent verification, the form being prescribed by the statute. Upon filing this petition, the court or judge shall make an order declaring petitioner insolvent, and directing the sheriff of the county to take possession of all the estate, real and personal, of the debtor except such as may be by law exempt from execution, and of all deeds, vouchers, books of account, and papers, and keep the same safely until the appointment of an assignee. The order shall forbid the payment of any debts, or delivery of any property to debtor for his use and the transfer of any property by him, and shall further appoint a time and place for a meeting of the creditors to prove their debts, and appoint one or more assignees of the estate, which

shall not be less than thirty days after the making of said order, and shall designate a newspaper or newspapers of general circulation in which publication thereof shall be made. Upon the granting of said order all proceedings against the insolvent shall be stayed. (Stat. 1885, pp. 219, 220.)

Involuntary.—An adjudication of insolvency may be made on the petition of three or more creditors, residents of the Territory, whose debts or demands accrued in this Territory amount to not less than five hundred dollars, provided said creditors or either of them have not become creditors by assignment at any time within thirty days prior to the filing of said petition. Such petition must be filed in the district court of the county in which the debtor resides or has his place of business, and verified by at least three of the petitioners, and must set forth the grounds upon which the adjudication is asked and which are too voluminous to be here enumerated, but which are in most respects the same as those which were prescribed by the bankrupt act of congress of 1867. Upon the filing of this petition, accompanied by a bond with two sureties in the penal sum of five hundred dollars conditioned that if the debtor should not be declared insolvent the petitioners will pay all costs and damages, including attorneys' fees, that the debtor may sustain by reason of the filing of the petition, the court or judge shall issue an order requiring the debtor to show cause why he should not be judged an insolvent debtor; and upon good cause shown, the court or judge may, at the same time or at any time thereafter, make an order forbidding the payment of debts and the delivery of any property belonging to the debtor to him, or for his use, or the transfer of any property by him not exempt from execution. The petition and order shall be served on the debtor in the same manner as is provided by law for the service of a summons in a civil action, *i. e.* personally if found, and by publication in cases where summons would be served by publication. The debtor may demur or answer, and if issues are raised by the debtor, the proceeding is to be conducted in the same manner as a civil action. If the respondent makes default, or if the issues shall be found against him, the court shall make an order adjudging the respondent insolvent at date of filing the petition, and direct him to file in court a schedule and inventory similar to those which are required of the voluntary insolvent.

In case of an adjudication of insolvency, whether voluntary or involuntary, the proceedings after the adjudication are precisely alike; and they are very nearly identical with the proceedings in bankruptcy prescribed by the act of congress above mentioned, and the rights, duties, and liabilities of the insolvent debtor, creditors, assignee and other officers, are nearly the same as those prescribed in that act, but they are too prolix and lengthy to be set out in detail here. At any time after the expiration of three months from the adjudication in insolvency, the debtor may apply to the court for a discharge from his debts. Notice is then given to all creditors who have proved their debts to appear on a day named for that purpose and show cause why the discharge should not be granted. The discharge may be opposed upon grounds prescribed by the act, which are nearly similar to the

grounds which were prescribed by the bankrupt act of congress of 1867, and the effect of the discharge when granted is very similar to the effect of a discharge under said bankrupt act.

Fraudulent preferences and transfers are prohibited, and penalties are imposed for concealing or falsifying, after the commencement of proceedings, of books, papers, or writings relating to the business, and for doing almost any other act in violation of the statute.

No creditor whose debt is provable under the provisions of this act shall be allowed to prosecute any suit against the insolvent to final judgment after the commencement of proceedings under this act, until the question of discharge has been determined, except in special cases by leave of the court. This has the effect of preventing attaching creditors from gaining any preference over those who do not attach, provided that proceedings in insolvency are commenced before judgment is obtained in the attachment suits.

Assignments (ARKANSAS) FOR THE BENEFIT OF CREDITORS.—In all cases where any person shall make assignment of any property, real, personal, mixed, or choses in action, for the payment of debts, *before* the assignee thereof shall be entitled to take possession, sell, or in any way manage or control any property so assigned, he shall file in the office of the clerk of the circuit court, having equity jurisdiction, a complete inventory and description of such property; and shall execute a bond to the State of Arkansas in double the value of the property, with security to be approved by the court, conditioned that the assignee shall execute the trust, sell the property to the best advantage, and pay the proceeds thereof to the creditors *mentioned in the assignment*, according to the terms thereof, and faithfully perform his duties according to law.

The assignee shall, at the first term of the court after one year from the date of the assignment, and at the corresponding term of said court every year thereafter, until the proceeds of the assigned property be disposed of, file his accounts in the clerk's office of said court. The reports of the assignee shall be examined by the court, and he may be allowed credits for such debts as are collectible, and a compensation not exceeding ten per cent on sums under one thousand dollars, and five per cent on sums exceeding that amount. If the property is involved in litigation, the court may authorize the assignee to employ an attorney. (Mansfield's Dig., §§ 305-309.)

The assignee shall be required to sell at public auction, within one hundred and twenty days after the execution of the bond, on thirty days notice, all the property assigned; and any person damaged by the neglect, waste, or improper conduct of the assignee, may bring his action on the bond in the name of the State for the use of such person.

The assignment is acknowledged as a deed. The assignee is appointed by the debtor.

Assignments (CALIFORNIA) FOR THE BENEFIT OF CREDITORS—May be made by an insolvent debtor under the provisions of C. C., §§ 3449-3473, to one or more assignees in trust for the satisfaction of creditors, subject to the provisions of the Civil Code relative to trusts and to fraudulent transfers.

and to the restrictions imposed by law upon assignments by special partnerships, corporations, and other specific classes or persons. A debtor is insolvent within the meaning of this title when he is unable to pay his debts from his own means as they become due. The assignment may provide for any subsisting liability, absolute or contingent, but is void against any creditor of the assignor not assenting thereto, if it give preference to one debt or class of debts over another, or tend to coerce any creditor to release or compromise his demand or provide for the payment of any claim known to the assignor to be false or fraudulent, or for the payment of more upon any claim than is known to be justly due from the assignor, or reserve to the assignor any interest in the property before all his debts are paid, or confer any power on the assignee which might delay or prevent the immediate conversion of the assigned property to the purposes of the trust, or if it exempt the assignee from any liability for misconduct or neglect of duty. (C. C., § 3457.) The assignment must be in writing, subscribed by the assignor, or his agent thereto authorized in writing, and acknowledged or proved and certified in the mode prescribed for recording transfers of real property, and recorded in the office of the county recorder of the county in which the assignor resided at the date of the assignment, or, if he was a non-resident, with the recorder of the county in which his principal place of business was situated, or where the principal part of the assigned property was situated. If these provisions are not complied with the assignment is void against every creditor of the assignor not assenting thereto. (C. C., § 3459.)

Within twenty days after making the assignment, the assignor must file with the said recorder a verified inventory showing all his creditors, and their residences, if known to the assignor, or, if not known, that fact must be stated, and the sum owing to each and the nature and true consideration of each liability and where contracted, all judgment and liens, or other security for the payment of any debt, and all the property of the assignor at the date of the assignment and the incumbrances thereon, and all vouchers and securities relating thereto, and the value of such property according to the best knowledge of the assignor, otherwise the said assignment is void against creditors of the assignor and against purchasers and incumbrancers in good faith and for value. (C. C., §§ 3463-3465.) Within thirty days after date of the assignment the assignee must give bond in such sum as the county judge may fix. After six months from the date of the assignment the assignee may be required, on the petition of any creditor, to account before the county judge. (C. C., § 3469.) Any person, though insolvent, may transfer property to a particular creditor to pay or secure a pre-existing debt, except as restrained by the provisions of the statute concerning insolvency, hereafter noted. (C. C., § 3451.) Under this part of the Code governing assignments for the benefit of creditors, there is no provision for the presentation or proof of claims, or for declaring dividends, or for the examination of the assignor, or for his discharge from liability. The assignment does not transfer any property which is exempt from execution, nor any insurance on the life of the assignor, unless the instrument specially mentions them and declares an intention that they should pass thereby.

(C. C., § 3470.) Until the inventory has been made and filed and the assignee has given the bond required, he has no authority to dispose of the estate or convert it to the purposes of the trust. (C. C., § 3468.)

Preferential assignments are not allowed.

One member of a partnership as such has no authority to make an assignment for the benefit of creditors unless his copartners have wholly abandoned the business to him or are incapable of acting.

An assignment for the benefit of creditors does not in any way affect a levy made by attachment prior to the assignment.

INSOLVENCY.—Voluntary. An insolvent debtor may petition the superior court of the county in which he has resided for six months next preceding the filing of his petition, to be discharged from all his debts and liabilities. He must owe debts exceeding three hundred dollars in amount. He must annex to the petition a schedule and inventory containing a true statement of all his debts and liabilities, persons to whom due and amount due to each, the nature and consideration of each indebtedness and when and where it accrued, any mortgage, lien, or security for payment. In the inventory he must set forth all his estates, real and personal, his homestead, if any, and all property exempt from execution. The petition, schedule, and inventory must be verified in form, as provided in section 5 of the act. The filing of the petition is an act of insolvency. Upon receiving the petition the court makes an order declaring the petitioner insolvent, and directing the sheriff to take possession of his estate and all his books, papers, vouchers, accounts, and deeds, until the appointment of an assignee. The order shall forbid the payment of any debts to the debtor, or to any one for his use, and the transfer of any property by him, and appoint a time and place for a meeting of the creditors to prove their debts and choose an assignee. Upon the granting of said order all proceedings against the insolvent shall be stayed. The order must be published by the clerk in the newspaper published in the county which is designated in the order of adjudication as often as the newspaper is printed before the meeting of creditors, which meeting shall not be less than thirty days after the making of the order, and a copy served by mail or personally on all creditors named in the schedule. The cost of commencing the proceeding and the cost of publication must be paid by the debtor in advance.

When the creditors who have proven their claims meet, they may elect an assignee, the opinion of the majority in amount of claims prevailing. The assignee must file a bond with two sureties. The sureties may be required to justify by any interested party. If the creditors fail to meet and appoint an assignee the court appoints.

The assignee, when appointed and qualified, is vested with the title to all the debtor's property, books, papers, and accounts, by an instrument under the seal of the court. All attachments levied within one month prior to the commencement of the insolvency proceedings are dissolved. Property exempt from execution is not included in the assignment. The assignee may recover all the estate, debts, and effects of the insolvent by suit.

The assignment must be recorded in every county in which the debtor

owns lands, within one month after it is made. The assignee must convert the estate into cash as soon as possible; he must not sell at private sale without the order of the court. Assignee has his necessary expenses, and seven per cent on the first thousand dollars; above that sum to ten thousand, five per cent; and for all above that sum, four per cent. Assignee must exhibit his account to the court at the expiration of three months from his appointment, and as often thereafter as occasion requires. Creditors whose debts are duly proved and allowed share in the property and estate *pro rata*. The only claims preferred are the wages of miners, mechanics, salesmen, servants, clerks, and laborers employed by the insolvent, to the amount of one hundred dollars each, and for services rendered within sixty days previous to the act of insolvency. (C. C. P., § 1204.) If the assignee refuses or neglects to render his accounts as required, or to pay a dividend when in the opinion of the court he shall have sufficient funds for that purpose, he may be discharged by the court and another appointed. Upon his final account being settled the assignee shall be discharged.

Involuntary.—An adjudication of insolvency may be made on the petition of five or more creditors residents of this State, whose debts or demands accrued in this State, and amount in the aggregate to not less than five hundred dollars, provided said creditors or either of them have not become such by assignment within thirty days prior to the filing of the petition. The petition must be filed in the superior court of the county in which the debtor resides or has his place of business, must be verified by at least three petitioners, and must set forth that the debtor is about to depart from the State with intent to defraud his creditors, or, being absent with such intent, remains absent, or conceals himself to avoid service of process, or conceals or is removing his property to avoid attachment; or, being insolvent, has suffered his property to remain under attachment or legal process for four days; or has confessed or offered to allow judgment in favor of any creditors, or willfully suffered judgment against him by default, or has suffered or procured his property to be taken on legal process with intent to give preference to a creditor, or has made any assignment, gift, sale, conveyance, or transfer of his estate or property with intent to delay, defraud, or hinder his creditors; or, in contemplation of insolvency, has made any payment, gift, sale, or transfer of his property; or has been arrested and held in custody on civil process founded on any debt or demand, such process remaining in force and not discharged by payment or otherwise for four days; or, being a merchant or tradesman, has stopped or suspended and not resumed payment within a period of forty days after maturity of any written acknowledgment of indebtedness, unless the party holding the acknowledgment has in writing waived the right to proceed under this subdivision; or, being a bank, banker, agent, broker, or factor, or commission merchant, has failed for forty days to pay any moneys received or left with him in a fiduciary capacity upon demand of payment, except savings and loan banks who loan the money of stockholders and depositors on real estate, and provide in their by-laws for the repayment of such deposits.

The petition may be amended on leave, and must be accompanied with an

undertaking in five hundred dollars for costs. Upon the filing of the petition the court issues to the debtor an order to show cause, at a specified time and place, why he should not be adjudged an insolvent debtor. A copy of the petition and order shall be served on the debtor in the same manner as a summons in a civil action at least ten days before the time fixed for the hearing. The debtor may demur or answer to the petition. The answer shall contain a specific denial of the allegations and shall be verified, and the issues so made may be tried with or without a jury, according to the practice provided for the trial of civil actions. If upon trial, or upon default, the issues are found for petitioners, the court orders the debtor to file a schedule and inventory as above provided in cases of voluntary insolvency. If the debtor fail to appear, or cannot be found, the schedule and inventory may be prepared by the sheriff or assignee from the best information obtainable.

Insolvency of Partnerships and Corporations.—Partners in business may be adjudged insolvent, on the petition of the partners or any of them, or on petition of five or more creditors of the partnership. In such case the order of court directs the partnership property and all the separate estate of each of the partners to be taken possession of. The creditors of the partnership and the separate creditors of each partner shall be allowed to prove their respective debts. The assignee shall be chosen by the creditors of the copartnership and shall keep separate accounts of the joint stock or property of the partnership, and of the separate estate of each member thereof, and after deducting expenses the net proceeds of the joint property shall be paid to the creditors of the partnership, and the net proceeds of the separate estate of each partner shall be paid to his separate creditors; the balance left, if any, shall go to the payment of the joint creditors. If there be any balance of the joint stock after the payment of the joint debts it shall be divided and appropriated to the respective estates of the partners. If the petition be filed by less than all the members of a partnership, those who do not join shall be ordered to show cause why they should not be adjudged insolvent in the same manner as other debtors are required to show cause upon a creditor's petition.

The provisions of the insolvent act apply to corporations, and upon the petition of any officer of the corporation, duly authorized by the board of directors, or upon a creditor's petition made as provided in respect to debtors, like proceedings are had as in the case of insolvent debtors. When a corporation is declared insolvent its property shall be distributed, but no discharge shall be granted to any corporation.

Proof of Debt from Debtor.—All debts due, and all debts existing but not payable until a future time, may be proved against the estate of the debtor. Demands on account of wrongful conversion of personal property may be proved and allowed as debts to the amount of the value of the property converted. Contingent liabilities may be valued and allowed for. A creditor holding security for his debt upon property of the debtor shall be admitted as a creditor only for the balance of his debt after deducting the value of such property, or he may be allowed to release the property to the assignee and prove the whole amount of his debt; or, if the value of the property

exceed the debt, the assignee may release to the creditor the right of redemption on receiving such excess, or he may sell the property subject to the claim of the creditor. If the property is not sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt. A creditor proving his claim shall not maintain any action therefor against the debtor unless a discharge has been refused the debtor or proceedings have ended without a discharge.

Discharge. A discharge may be applied for at any time after the expiration of three months from the adjudication of insolvency. No discharge shall be granted where the debtor has committed fraud or sworn falsely; any creditor may oppose the discharge, and have issues made up and tried by a jury. Fraudulent debts are not discharged by the certificate of discharge. Fraudulent concealment of property, falsification of books, creation of fictitious debts, and the like, on the part of the debtor, are punishable by imprisonment in the county jail for not less than three months nor more than two years.

All attachments levied within thirty days prior to insolvency proceedings are dissolved thereby. An execution actually levied prior to insolvency proceedings is not affected thereby.

Assignments (COLORADO).—Any person may make a general assignment of all his property for the benefit of his creditors by deed duly acknowledged and filed for record in the recorder's office of the county where the assignor resides, or, if a non-resident, in the recorder's office of the county in which his principal place of business is. Every deed of assignment must by its terms show that it is made for the benefit of all the creditors of the assignor in proportion to the amount of their respective claims. No preferences are allowed, except that the valid claims of laborers, servants, and employees of the assignor for wages earned during the six months preceding the assignment, not to exceed the sum of fifty dollars in any one case, shall be preferred, provided such claims are still in the hands of the person earning the same. Claims filed with the assignee within the first three months after the assignment shall have priority over those filed thereafter. The assignee is required to give good and sufficient bond in double the amount of the inventory and valuation, with sureties to be approved by the clerk of the district or superior court within the county in which the assignment is made. All proceedings under the assignment are under the supervision of the district or superior court of the county in which the assignment is made, and the assignee is subject to its orders unless the creditors and assignee agree in writing that such proceedings may be had without the intervention of the court; in which case such court or the judge thereof shall cease to have any jurisdiction over the same.

Assignments (CONNECTICUT).—INSOLVENT LAWS AND ASSIGNMENTS.—(Gen. Stat., p. 378.) If a debt exceeding one hundred dollars is sued for, and no sufficient property can be found to attach, the creditor can apply to the court of probate to appoint a trustee in insolvency of the debtor's estate. A citation then issues, and a hearing is had. If the petition is

granted the trustee takes all the debtor's estate not exempt from execution and voluntary conveyances, and attachments on mesne process or incomplete levies of execution, commenced within sixty days previous, are dissolved. The debtor receives an allowance from his estate for the support of his family, and, if he pays seventy per cent of all claims proved, obtains a full discharge. Commissioners are appointed in each case to pass upon claims presented, with an appeal to the superior court. Three to six months are allowed for proving claims. Proving claim and accepting dividend does not operate as a discharge of the debtor.

Preferential assignments are not allowed, but assignments in insolvency can be voluntarily made by any one to a trustee of his own selection; subject to the substitution of another by the court of probate, if deemed proper. The estate is settled in substantially the same way as in involuntary proceedings.

All debts due any laborer or mechanic for personal wages for labor performed within three months are preferred, to the amount of one hundred dollars; also the costs of incomplete levies of executions and attachments, which are dissolved by insolvency proceedings.

Assignments (DAKOTA).—An insolvent debtor may, in good faith, execute an assignment of property to one or more assignees, in trust towards the satisfaction of his creditors; subject, however, to the provisions of this code relative to trusts and fraudulent transfers, and the restrictions imposed by law upon assignments by special partnerships, by corporations, or by other specific classes of persons.

An assignment for the benefit of creditors may provide for any subsisting liability of the assignor which he might lawfully pay, whether absolute or contingent. Any person, resident or non-resident, may make an assignment of his property to his creditors, either with or without their consent.

An assignment for the benefit of creditors must be in writing, subscribed by the assignor, or by his agent thereto authorized by writing. It must be acknowledged, or proved and certified, similar to a deed of real estate, and filed for record with the register of deeds of the county in which the assignor resides, or, if a non-resident, in which his principal place of business, or principal part of the assigned property is situated, within twenty days after the assignment. The assignor must make and file a full and true inventory, with an affidavit of verification annexed, with the registers of deeds of the counties where the assignment is filed. The assignment is void against creditors of the assignor and purchasers, and incumbrancers in good faith and for value, if not recorded and the inventory filed within twenty days.

The assignee must give bond to the Territory in double the amount of the value of the property assigned, with sufficient sureties to be approved by the judge of the district court within thirty days after the date of the assignment, to be filed in the same office with the inventory.

The law does not provide for the proof and presentation of claims. An assignment is void if it prefers creditors; if it tend to coerce any creditor to release or compromise his demand; or if it provide for the payment of any

known false or fraudulent claim, or for the payment of more upon any claim that is known to be justly due.

Property exempt from execution and insurances upon the life of the assignor do not pass to the assignee, unless expressly declared to pass in the assignment. The assignee must account within six months from date of assignment. The dividends are made in proportion to and applied upon respective demands. The assignment does not discharge the assignor without the consent of all the creditors. The assignor, like a trustee, must submit to examination. The assignee acts under the direction of the assignment and the court. (C. C., §§ 2027-2046.)

The assignment does not affect a levy made under attachment.

Assignments (DELAWARE).—Deeds of voluntary assignment for the benefit of creditors should be acknowledged before a notary public and filed in the office of the register of the court of chancery. The assignee must then file in said office, within thirty days after the execution of the deed of assignment, a schedule of the property assigned, with an affidavit that such schedule is correct. The chancellor appoints two disinterested persons as appraisers of the estate, who shall be duly sworn or affirmed, and shall also file in said office their inventory and appraisal with affidavit, whereupon the assignee shall give bond with warrant of attorney in the name of the State of Delaware, with sureties to be approved by the chancellor in double the amount of the appraised value of the estate so assigned. The bond is for the faithful discharge of the trust, and shall inure to the use of persons interested in the property assigned. The assignee shall render an account of his trusteeship every year from the date of the bond, before the register in chancery, until the estate is closed and final account rendered and approved, and may for cause shown be removed by the chancellor and another appointed in his stead.

Any person interested may file exceptions to the accounts within one year from the date of the same. These exceptions will be heard by the chancellor, either in term time or at his chambers. Any order by the chancellor in the premises may be enforced by attachment or imprisonment. There is no provision for giving notice, proving claims, discharging debtor, or subjecting him to a personal examination. Preferential assignments are not allowed. Proving claim in assignment proceedings or accepting a dividend will not operate as a discharge of the debtor, except a release to that effect is especially executed.

Assignments (DISTRICT OF COLUMBIA).—As at common law; no statutory provisions; there may be preferred creditors. There are practically no insolvent statutory provisions in force. A levy made under an attachment prior to an assignment for benefit of creditors will not be affected by such assignment. The old Act of Maryland, 1774, on the subject providing for arrest and imprisonment is practically inoperative since the abolishment of imprisonment for debt by Act of Congress.

Assignments (FLORIDA).—INSOLVENT LAW.—There is no provision made by law for insolvent debtors. A debtor may assign his property with or

without preference. Proving claim and accepting dividend will not operate as a discharge, the amount so received being applied on account.

Assignments (GEORGIA).—Every assignment or transfer by a debtor insolvent at the time, of real or personal property, or choses in action of any description, either in trust or in behalf of creditors, where any trust or benefit is reserved to the assignor or any person for him, is fraudulent in law against creditors, and as to them null and void. Likewise every conveyance of real or personal estate by writing or otherwise, and every bond, suit, judgment, and execution, or contract of any description, had or made with intention to delay or defraud creditors, and such intention known to the party taking, is void as to creditors. So also every voluntary deed or conveyance, not for a valuable consideration, made by debtor insolvent at the time of such conveyance.

A debtor may prefer one creditor to another, and to that end may *bona fide* give a lien by mortgage or other legal means, or he may sell in payment of the debt, or he may transfer negotiable papers as collateral security, the surplus in such cases not being reserved for his own benefit or that of any other favored creditor to the exclusion of other creditors. But in case of limited partnerships, partners, whether general or special, insolvent or in contemplation of insolvency, cannot make assignment in preference of creditors.

A general assignment for the benefit of creditors will not affect a levy made under an attachment prior to such assignment. (53 Ga., 114.)

INSOLVENT LAWS.—In voluntary assignments by insolvent debtors for the benefit of creditors, there must be a full and complete inventory and schedule of all the assets of every kind held, claimed, or owned by the debtor at the time of the execution of the deed of assignment, which must be sworn to by the debtor. One of a firm or chief officer of a corporation may make the oath required. Without such sworn schedule the assignment is invalid. Upon indictment and conviction for filing a false, deceptive, or incomplete schedule, the party is liable as persons convicted of perjury.

In case any corporation not municipal, or any trader or firm of traders, shall fail to pay at maturity any debt, payment of which has been properly demanded, and is insolvent, a court of equity, under a creditor's bill by one or more creditors holding such debts, may proceed to collect up all the property and assets of such debtor and appropriate the same to the creditors, for which purpose the chancellor may appoint a receiver. Upon such appointment no creditor shall acquire any preference by any judgment or lien, or any suit or attachment under proceedings commenced after filing the bill, nor by assignments or mortgages made thereafter; but the assets shall be divided *pro rata* among the creditors, preserving existing liens. During the pendency of the proceedings the court may make a suitable allowance for the defendant's support, having regard to his condition and the circumstances of his failure.

Any person or firm shall be considered a trader who is engaged as a business in buying and selling real or personal estate of any kind, or who is a

banker or broker or commission merchant or manufacturer manufacturing articles to the extent of five thousand dollars per annum.

In the final decree the court may recommend to the creditors the debtor's discharge from further liability, if there has been an honest and fair surrender of his assets for distribution under the law. (Acts, 1881.)

Assignments (IDAHO).—An assignment of property is not valid unless it be of all the insolvent's property and for the benefit of all his creditors.

Insolvent must petition the judge of the district court of the district in which he resides, which petition must briefly state the circumstances which compel him to surrender his property to his creditors, and conclude with a prayer to make cession of his estate and be discharged. He must annex to such petition a schedule of all his property, both real and personal, and also a list of all his creditors, with the amount due each, to the best of his knowledge; also a statement of his indebtedness and nature thereof; and he must also make a perfect inventory of his property, and, as near as possible, estimate the value thereof. Such schedule shall be signed by the debtor and sworn to before the judge having jurisdiction. The oath is prescribed by statute. The inventory is not conclusive.

The judge shall make an order, and the clerk shall give notice thereof, requiring all the creditors of such insolvent (except mortgagees and attaching creditors) to appear upon a specified day (not less than thirty nor more than forty days from the first publication of said notice) before said judge, either at chambers or in open court, and show cause why the prayer of the alleged insolvent should not be granted. When issuing the order for the meeting the judge shall direct that all proceedings against the debtor be stayed, except for foreclosure of mortgages or other liens, or of attachment creditor. The judge may appoint a receiver if necessary. At the meeting of the creditors (if no sufficient cause be shown why debtor should not have the benefit of the insolvent act, and he shall produce satisfactory proof of the facts on which his affidavit is founded) they must prove claims and proceed to appoint one or more assignees, not exceeding three. The assignee must give a bond, the amount of which shall be fixed by a majority of the creditors; and if the creditors should not fix the amount, it shall then be fixed by the judge. The assignee shall forthwith file with the clerk of the court a copy of the assignment. The property of the debtor vests in the assignee after he is duly qualified, and the insolvent must deliver to the clerk of the court all books, notes, accounts, etc., and the clerk must deliver the same to the assignee. The assignee shall apply to the court for an order to sell at public auction the assets of the insolvent, which sale may be had after three weeks public notice thereof has been given in a newspaper. The assignee is always subject to the order of the court.

If the insolvent makes any transfer or sale of property after assignment or filing his petition, he will be considered a fraudulent bankrupt, and all such sales or transfers will be void; any creditor, upon accusation of fraud made in writing, may oppose any further proceedings, which accusation must be tried in the district court before a jury. If the jury find the accusation true the debtor shall be deprived forever of benefit of the insolvent law.

If the appointment of any assignee be not legally made, objection thereto must be taken within ten days, other than for fraud of the insolvent, which may be taken at any time.

Personal property exempt from execution is to be first set apart for the insolvent by the judge.

Preferential assignments are not allowed. The proving of a claim in insolvency or in general assignment proceedings and accepting dividend will operate as a discharge of the debtor.

All mortgages and liens and attachments prior to assignment may be enforced after surrender of property.

The judge shall appoint an attorney to represent non-resident creditors.

If no fraud is found, insolvent may be discharged without consent of creditors. If after an insolvent has had the benefit of the insolvent act it is made to appear that he has concealed any part of his property, or given a false schedule, or committed any fraud, he will be declared to have forfeited all the benefits of this act, and he cannot avail himself of any of its provisions in bar to any claim. (Rev. Laws, Idaho, 8th Sess., pp. 767, 777.)

Assignments (ILLINOIS)—INSOLVENT LAWS.—Assignments for the benefit of creditors are administered under the supervision of the county court. The debtor is required to annex to his assignment an inventory of his estate under oath, and a list of his creditors, their residence, place of business, and amount of respective demands. Such inventory is not conclusive as to amount of debtor's estate, and the assignment vests in the assignee all property of the debtor comprehended within its general terms and not exempt. The assignee has such power to dispose of, and act generally in regard to, the property assigned, as the debtor had at the time of the assignment. The assignment must be acknowledged and recorded in the county where the maker resides, or where the business, in respect of which it is made, is carried on. If it embraces lands, it must be recorded also in the counties where the land is situated. The assignee must forthwith give notice thereof by publication in some newspaper in the county for six weeks, and must mail to creditors notice to present their claims under oath within three months. The assignee must forthwith file in the county court his sworn inventory and valuation of the estate and give bonds in double the valuation. He then enters upon his duties. At the expiration of three months from the time of first publishing notice of the assignment, the assignee presents to the court proof of the publication and of the notices mailed to creditors, and a list of all claims presented. Within thirty days thereafter exceptions may be filed to the claim of any creditor, of which the latter receives notice, and a hearing is had thereon at the next term of court. At the first term after the three months allowed for presenting claims, should there be no exceptions, or if such are made and disposed of, the assignee is ordered to make equal dividends among creditors, except as to laborers and servants, whose claims are preferred in payment, and within one year thereafter is required to render a final account. Provision is made for the appointment by the court of another assignee in case of death, neglect of duty, or failure to qualify, on

the application of any creditor, and also for additional security in certain emergencies. Any provision in the assignment for preferences is void; and all debts are required to be paid *pro rata*. Debts to become due, as well as debts already due, may be proved, a reasonable abatement being made on the former when not drawing interest. Commissions and allowances to the assignee are at the discretion of the court. The debtor may be compelled to submit to examination touching his estate. There are no provisions for the debtor's discharge. No assignment shall be declared fraudulent or void for the want of any list or inventory as provided by the act. Claims not presented by creditors within three months from the publication of notice, as aforesaid, cannot participate in the dividends until after the payment in full of all claims presented within that time and allowed. All proceedings may be discontinued upon the assent, in writing, of the debtor and a majority of his creditors, in number and amounts; in such case all parties are remitted to the same rights and duties existing at the date of the assignment, except so far as such estate shall have already been administered and disposed of. The court has power to make all needful orders to carry this provision into effect. (Hurd, 147, 631.)

Assignments (INDIANA).—Our assignment law does not change the rule allowing a debtor in failing circumstances to make an actual *bona fide* sale of his property, and apply the proceeds in payment of his debts, or *any portion of them*. (23 Ind., 290.) The act “providing for voluntary assignments for the benefit of creditors,” etc., in force in Indiana, took effect August 6th, 1859. Its provisions as modified to date are, briefly, as follows: Any failing debtor may make a general assignment of all his property, in trust, for the benefit of all his *bona fide* creditors. Such assignments must be by indenture, duly signed and acknowledged, and recorded, within ten days, in the recorder's office of the county where assignor lives. The indenture must describe all real estate and be accompanied with a schedule enumerating all personalty assigned, verified by oath, with the statement that nothing has been withheld or transferred except by said assignment, and no judgment been confessed to defraud or delay creditors. Within fifteen days a copy of the indenture and schedule must be filed in the clerk's office by the trustee, who, before acting, must qualify by oath, show the probable value of the property delivered to him, and file a bond in double the value thereof, and if he fails therein the court may remove him and appoint another. After qualifying he must give proper public notice of his appointment. Within thirty days he must file a complete inventory of all property that has come to his hands or of which he has knowledge, and from time to time additional inventories, if need be. In twenty days after filing inventory he must file appraisement made by two reputable householders. If the assignor be a resident householder of this State the appraisers set off to him six hundred dollars worth of real or personal property, as he may elect.

The trustee must proceed at once to collect the credits of the assignor, and, after thirty days notice, to sell his personalty, for cash, or on credit of not

exceeding twelve months, at auction. But the court may order private sale, if deemed best, and fix the terms thereof, or may extend the time for selling. The court has supervisory power over the entire estate, and may, at any time, make all necessary orders for the interest of the creditors, before sale. (See acts February 1st, 1875, and February 26th, 1875; R.S. 1881, § 2671.)

Report, under oath, is required of the trustee, within six months, showing cash on hand, claims presented, those allowed and disallowed. The latter are docketed and set down for trial as other causes. Where there are liens on assigned property it may be sold subject thereto, or the court may order them paid, if for the benefit of creditors, from the general fund. Holders of liens must first exhaust them, and may only claim dividend *pro rata* on the residue.

After the first report, if there be no contested claims, the court may order the trustee to pay to the clerk the money in his hands for *pro rata* distribution, deducting fees and allowances to trustee.

The court may, at any time, by warrant, arrest the assignor or other person, if satisfied that any fraud is being perpetrated on the estate, subject them to examination, and enjoin any transfer, etc. Claimants must make oath that their claims are just and no part thereof for usury, or if so, state what part. The trustee may compromise debts due the assignor, if for the general interest. After one year, or at the next succeeding term thereafter, the trustee must file his final report, unless for cause the court shall grant further time. The court may, for cause, remove a trustee at any time, and in such case, or on death or resignation, appoint a successor. An appeal to the supreme court, in favor of any party, lies as in other civil causes. Clerk's fees are the same as in other actions; appraiser's fees, one dollar per diem; trustee's compensation is fixed by the court—all payable out of the general fund. Surviving partners may make assignment. (R. S. 1881, §§ 2662-2683.)

The statute makes no provision for the release of the assignor.

An assignment does not affect any levy or lien under execution, mortgage, judgment, or attachment previous to the assignment.

Assignments (IOWA)—INSOLVENT LAWS.—A general assignment of property by an insolvent is not valid unless it be made for the benefit of all his creditors. No preference allowed, except that in the absence of actual fraud an insolvent may sell or mortgage to one creditor and afterwards make a valid general assignment. Assent of creditors is presumed. The debtor shall annex to such assignment an inventory, under oath, of his estate, real and personal, according to the best of his knowledge, and also a list of his creditors, with the amount of their respective demands; such inventory is not conclusive; such assignment vests in the assignee the title to any other property belonging to the debtor at the time of making the assignment. Every assignment must be acknowledged the same as conveyances of real estate, and recorded in the county where the assignor resides, or where his business has been carried on. The assignee shall also forthwith file with the clerk of the district or circuit court of the county where assignment is recorded a full inventory and valuation of said estate, under oath, and shall enter into

bonds to said clerk, for the use of the creditors, in double the amount of the inventory and appraisement, with one or more sureties to be approved by the clerk, for the faithful performance of his trust. The assignee shall forthwith give notice of such assignment by publication in some newspaper in the county, which publication shall be continued at least six weeks; and shall also forthwith send a notice by mail to each creditor of whom he shall be informed, notifying the creditors to present their claims, under oath, to him within three months thereafter. At the expiration of three months from the time of first publishing notice, the assignee shall file with the clerk a true list, under oath, of the creditors who have filed their claims, together with a statement of their claims. Any person may appear within three months after filing such report and file with the clerk any exceptions to the claim of any creditor; notice thereof shall be served upon the creditor, as in case of an original notice, returnable at the next term; and at such term the court shall hear the proofs and allegations of the parties, and shall render judgment thereon, and may allow a trial by jury thereon. If no exception is made to the claim of any creditor, or if the same has been adjudicated, the court shall order the assignee to make dividends among the creditors *pro rata*, and as soon as may be to render a final account. Such commission shall be allowed the assignee as is just and right.

The assignee is always subject to order of court. No assignment is void for want of any list or inventory. Citation may issue upon application of the assignee, compelling the debtor to appear before the court to answer such questions as may be proposed to him. The assignee shall file with the clerk an additional inventory of all property that comes into his hands after the filing of the first inventory. A valid attachment levied before assignment will not be affected thereby.

Any creditor may claim debts not due as well as debts due, but on the former a reasonable abatement shall be made when same are not drawing interest, and all creditors who shall not file their claim within three months from the first publication of notice of assignment shall not participate in the dividends until after the payment in full of all claims presented within said term.

An assignment does not discharge the debtor from all his debts and liabilities, but only entitles all his creditors to share equally in his estate.

The assignee has full power to sell real and personal property and to bring suits, but no sales of real estate shall be made without notice as in sales under execution.

If assignee dies before closing his trust, or fails for twenty days after assignment to file inventory and valuation, and to give proper bonds, the court, on application of any person interested, shall appoint some person to execute said trust, with the same powers as were given to the original assignee named in the assignment. In case of wasting or misapplying the estate, the court may require additional security or remove such assignee and appoint another. The debtor appoints his assignee.

Assessments or taxes levied under the laws of Iowa, including municipal corporations, are preferred, and must be first paid in full.

No assignment shall be declared fraudulent or void for want of any list or inventory.

Foreign creditors are not compelled to accept dividend or composition, and a refusal to accept does not prejudice their right of action.

Assignments (KANSAS).—Every voluntary assignment of lands, tenements, goods, chattels, effects, and credits, made by a debtor to any person, in trust for his creditors, shall be for the benefit of all the creditors of the assignor, in proportion to their respective claims; and every such assignment shall be proved or acknowledged, and certified and recorded in same manner as prescribed by law in cases wherein real estate is conveyed. (§ 370.)

The deed of assignment is required to be recorded in the office of the register of deeds of the county where the assignor resides, but does not necessarily remain on file any where. Within thirty days after the execution of the deed of assignment, an inventory of the property, effects, and things assigned must be filed in the office of the clerk of the district court of the county in which the assignor resides, and must be sworn to. (§§ 371, 372.)

A schedule of the liabilities of the assignor or assignors, with the name of the creditors, the amount and character of their debts, and post-office address, so far as the same shall be known to such assignor or assignors, verified by his or her affidavit, etc., shall be filed on the day of executing such assignment, in the clerk's office of the district court of the county in which such assignment is recorded.

The clerk of the district court, within two days after the schedule is filed, shall mail to the post-office address, as given, of each such creditor whose demand exceeds ten dollars, a notice of such assignment, name of assignor or assignors, date of assignment, name of assignee, and names of all creditors and amounts as stated in such schedule; and shall name a day, not less than twenty nor more than thirty days from the day of such assignment, on which creditors shall convene at said clerk's office and choose an assignee; and until such assignee is chosen the assignee named in such assignment shall exercise no other powers thereunder than the safe keeping and control of the property assigned. (§ 412.)

If a majority of the creditors whose debts exceed ten dollars are present, either in person or by attorney, an assignee may be chosen—said choice to be made by the greater part in value and number of said creditors then attending; and to determine who are creditors and the amount of their claims, the clerk of said district court may administer oaths, etc. (§ 413.) The clerk shall immediately file in his office a report of the particulars of said meeting of creditors, setting forth the names of the creditors who were present and the amounts due them respectively, and the action of the creditors in choosing an assignee, etc. Assignee thus chosen must signify his acceptance in five days after being notified of his election, and must file a bond. If the creditors fail to elect an assignee, then the judge of the district court appoints, and in his absence the probate judge appoints. All elections or appointments of assignee shall be subject to be set aside by the judge of the district court, upon exceptions properly filed. (§ 414.)

The assignee, after being elected or appointed and approved by the judge, must give bond in double the amount of the appraised value of the estate and effects assigned. (§ 378.)

The assignee shall appoint a day, within six months after the date of the assignment, and a place, which shall be the county seat of the county where the inventory is filed, when and where he will proceed, publicly, to adjust and allow demands against the estate and effects of the assignor. (§ 389.)

The assignee shall give notice of the time and place of adjusting and allowing demands against the estate of his assignor, by advertisement, published in some newspaper printed in the county, or, if there be none, in the one nearest the place where the inventory is filed, for three months, the last insertion to be at least four weeks before the appointed day; and also, whenever the residence of any of the creditors is known (and they should be all known) to him, by letter addressed to such creditors at their known or usual places of residence at least three months before the appointed day. (§ 390.)

The assignee shall require such evidence, and no other, of the justice of such demands, as is required to establish demands of a similar character in the district court in suits between the original parties to the contract. (§ 392.)

The practice is, if the assignor has set forth in his schedule that he owes the creditor all he claims, for the creditor merely to append his own affidavit that all just credits and offsets have been allowed, and that the amount claimed is justly due, and still remains unpaid. But if from any cause regular proof is required, the claim would have to be proven by witnesses upon the stand, or by deposition, as in any litigated case.

The decision of the assignee in relation to all claims presented to him for allowance shall be final, unless a creditor or some other person interested shall, after a decision is made on any such claim, ask an appeal therefrom; and all appeals so asked shall be allowed by such assignee to the district court of the county having jurisdiction thereof. (§ 393.)

No preferences are allowed (see § 370, *ante*,) and no provision is made by law for any exemption to the family of the debtor. The assignment is merely a conveyance, and transfers what is stated in the deed of assignment, no more, no less.

The court or judge in vacation shall order sale of assigned property in such manner and at such time as shall appear most advantageous to all parties in interest.

As soon as practicable, and not exceeding one month after the time for an allowance of demands had under this chapter (assignments), the assignee or assignees shall pay upon the demands allowed, according to their right, as much as the means on hand will permit, after reserving enough for proper fees, costs, expenses, and demands whose trial is legally continued or removed, and as often thereafter as a dividend of five per centum can be paid upon the demands allowed as aforesaid. (§ 404.)

This assignment only has the effect of distributing a person's property ratably among all his creditors, but does not discharge him from all his debts; nothing in this State can do that but an agreement to that effect

with each creditor personally. The amount received is credited upon the claim, leaving the remainder of the claim still due and unpaid, and to be collected in any legal way thereafter, if practicable.

Foreign creditors are not compelled to accept any dividend declared, but as such acceptance does not affect in any way their right to collect the balance of their claim, they are always quite willing to accept it.

The assignment law of Kansas is in no respect an insolvent law; it does not discharge the debtor from his debts; it does not require him to submit to an examination, nor is there any punishment attached if he does not assign all his property, or if he fraudulently conceals any portion of it. It merely provides for the ratable distribution among all his creditors who prove their claims before the assignee at the proper time and in the proper manner, of all the property assigned by the debtor.

Assignments (KENTUCKY).—INSOLVENT LAWS AND ASSIGNMENTS.—Deeds of assignment are acknowledged, filed, and recorded as other deeds are.

Assignee is named by debtor, and is removable as other trustees for cause. He must execute sufficient bond with surety approved by the county court, and take oath faithfully to perform his duties, before executing the trust. He must return inventory under oath to the county court within sixty days, and render a report of sales within two years from the time of qualification. The administration of the assigned estate is under the control of the courts of equity, and settlements may be made or compelled in said courts.

Notice to prove claims is given by publication in a newspaper, time being fixed by court. Claims may be proved at any time until final distribution. Rejection of claim by court is a judgment against creditor. Creditors may sue assignee upon claims rejected by him. Preferences are not allowed. Property exempt from execution is also exempt from assignment. Dividends should be made as the estate is converted into money. When fraudulent preference is attempted and suit is brought to set it aside for benefit of creditors generally in the distribution of such estate, debts due as guardian, or administrator, or executor, or trustee under deed or will, duly recorded, have preference. If preference be given by deed, transfer, or mortgage to a creditor, or judgment be suffered, or any act or device be done, or resorted to, with the design to prefer, in contemplation of insolvency, a court of equity will set the same aside if suit be brought by another creditor within six months, and same will operate as a general assignment for benefit of creditors. (Gen. Stat., art. II., ch. 44; Act of March 8th, 1876.)

Attachments levied prior to voluntary assignment give priority, if sustained by judgment of court.

Assignments (LOUISIANA).—The debtor cannot assign his property to his creditors by private act and obtain a discharge of his debts without their unanimous consent. As a matter of contract they may accept the assignment, and discharge their debtor from all of his debts, but such assignment has no effect except against the parties thereto.

INSOLVENT LAWS.—Under the insolvent law of this State a debtor can surrender his property and obtain a discharge from all of his debts, provided a

majority of his creditors in number and amount agree thereto. A surrender of property made by a debtor, together with an order of court staying all proceedings against him, suspends all actions—whether by attachment or otherwise—then pending; and all claims in suit must be transferred to the court where the surrender was made, and cumulated with the insolvent proceedings. A creditor may pursue his remedy until a stay of proceedings arrests him. A final judgment which was legally obtained before a cession of property will not be affected by the surrender.

Voluntary Surrender.—Any person may make a surrender, if *bona fide*, without fraud. It must be by petition to the judge having jurisdiction of the debtor's domicile, stating circumstances obliging surrender, asking, for meeting of creditors, as the judge may direct, to present statement of affairs to them. A schedule must be annexed to the petition, signed and sworn to by the debtor, containing summary of affairs, losses sustained, names of creditors, residences, amounts, and property of every kind, and approximate value. Property exempted need not be mentioned. If judge be satisfied that all formalities have been complied with, he accepts surrender for benefit of creditors, and orders a meeting of them—if resident, within ten days, non-resident, thirty days—and appoints an attorney to represent non-resident creditors. After surrender and acceptance, property is fully vested in creditors. A provisional syndic may be appointed, if creditors ask it, until syndic be elected. He must give bond with security. His duties are merely conservatory, and he accounts to syndic when elected. If debtor fails or refuses to surrender property, he may be imprisoned until he does surrender.

At meeting of creditors before notary or other officer, debtor must present copy of petition, decree thereon, schedule, and books and papers explaining his affairs. Creditors must swear to the justice of their claims. The notary or other officer issues certificate of election of syndic, requiring syndic to give bond with surety. Two-thirds of creditors may dispense with surety, except for mortgage and privilege claims. Creditors may vote by proxy. Any person may be elected syndic. If creditors fail to elect, judge may appoint one. In electing a syndic, or sale of property, a majority of creditors in number and amount shall prevail. The wife in partnership with her husband or his heirs cannot vote except their rights are settled by partition or judgment of separation. Mortgage and privilege creditors are not bound by decision of the other creditors, but may require the property on which their lien exists to be sold for cash. Oppositions to appointment of syndic or charges of fraud must be made within ten days after creditors' meeting, and the matter shall be tried by jury.

Fraud may consist in concealment of body or property; of commercial books or papers; debtor's absconding; passing simulated deeds of property; omitting to disclose all of it; purloining books or any of them; altering, changing, or making them anew. Presumptive fraud may consist in giving within a year, prior to surrender or being proceeded against, any unjust advantage or preference; anticipating any payment, or purchasing property for cash and selling or disposing of it, so that vendor cannot seize it; or failing to pay over money collected for another, or deposited with debtor;

making conveyance, transfer, mortgage, or pledge to the prejudice of his creditors. A debtor charged with fraud may be arrested. He may be interrogated in writing, and he must answer categorically. Every insufficient answer shall be construed against him. If the debtor be convicted, he shall be forever deprived of the benefit of the insolvent law, and shall be imprisoned not exceeding three years. The creditor may proceed in the same action against the debtor and the party in whose favor the sale, pledge, or payment has been made. Any debtor selling or mortgaging his goods, or otherwise disposing of them, or confessing judgment, in order to give an unjust preference to any creditor, within three months prior to his failure, shall be debarred the benefit of the insolvent laws, and such deeds or acts shall be declared null and void. Defaulting receivers of public funds, and all unfaithful depositaries, shall be deprived of the benefit of the act; also where losses occurred from gambling, dissipation, or debauch.

The syndic may sue and be sued, sell at public auction debtor's real estate, upon terms fixed by creditors, also all personal estate; he must deposit funds in chartered bank, and cannot withdraw them except by order of court; he must file table of distribution of funds in his hands, and all creditors must be notified thereof by the clerk of the court, by publication in the newspapers. Syndics may be dismissed from office for failure to comply with these requirements, and condemned to pay twenty per cent interest per annum on money not deposited, or withdrawn without order of court, besides all special damages. Any creditor can, by motion, compel the syndic to file his bank book in court in ten days, and a true statement of his accounts, or, in default thereof, be dismissed from office, and pay ten per cent per annum interest on all sums for which he may be responsible.

Forced Surrenders.—Any judgment creditor, after execution returned "no property found," may compel debtor to surrender. The creditor must present a petition to the court or judge at chambers having jurisdiction of debtor's domicile, showing he is a judgment creditor, for what amount, that execution has been returned no property found after due demand, and that he believes the debtor has property available to his creditors, and praying that the debtor be ordered to make a surrender. Petition must be signed and sworn to by the creditor or his attorney. The judge will order debtor to file schedule, as in voluntary surrender, by a day fixed. Upon filing this schedule the court will order a meeting of the creditors before a notary, at which meeting a majority in number and amount shall determine whether the surrender shall be made. If recommended, the court will order the debtor to make a surrender by a time fixed. If debtor fails or refuses to obey he may be imprisoned until he complies. The surrender shall be made and accepted, syndics elected, and all proceedings conducted as in voluntary surrenders. Unless a *non-resident creditor* participates in the proceedings he is not bound by them, nor is his debt affected, and he may proceed against the debtor, here, in United States court, if his claim exceeds five hundred dollars.

Respite.—A respite is voluntary where all the creditors consent to the time debtor asks in which to pay his debts. It is forced where a part of the creditors refuse to accept the debtor's proposal, and he compels them by judicial

authority to consent, then the opinion of the majority in number and in amount prevails. To obtain a respite debtor must present petition to court of his domicile, praying a meeting of his creditors, and annex thereto a true and exact schedule of his property as well as his debts, which must be sworn to. The meeting shall be ordered by the judge, on a certain day, before a notary public, and all creditors summoned, if within the court's jurisdiction; otherwise they are notified by letter by the notary. If all creditors reside in the parish, meeting may be held within ten days; if otherwise, in thirty days. The meeting, as well as the object of it, must be advertised at least three times. The creditors make oath to their claims; no creditor can vote without. Creditors residing out of the State are represented by an attorney appointed for that purpose. His duties are to see that the proceedings are regular, but he cannot grant any thing in the name of the person he represents. Notary may adjourn meeting from day to day, not to exceed ten days. The respite, to be binding, must be approved by the judge. All oppositions thereto must be filed within ten days after the *proces-verbal* has been filed in the clerk's office. The property of the debtor is not hypothecated by reason of the respite, unless expressly granted on that ground; but creditors obliged to abide by the will of the majority may require that the debtor shall furnish security for the property left in his possession, or its proceeds if sold. Creditors with special mortgage or privilege are not bound by the respite. Respite cannot be for a longer time than three years. If a debtor has claimed the benefit of a surrender, he cannot afterwards pray for a mere respite. When the creditors refuse a respite a surrender must be made under the insolvent law.

Assignments (MAINE)—INSOLVENT LAWS.—(General insolvent law, ch. 70.) The courts of probate in the several counties are made courts of insolvency. Proceedings in insolvency are had only when debts are not less than three hundred dollars; are both voluntary and involuntary, and are carried on in the county where debtor resides, or from which he has absconded within six months, leaving property therein.

In voluntary proceedings the debtor applies by petition, setting forth his inability to pay his debts and his willingness to assign his property for his creditors. A warrant then issues on which the sheriff takes possession of the estate and papers, and notice is given. (§§ 15, 16.)

Involuntary proceedings are commenced by one or more creditors alleging that they believe their debts to be more than one-fourth of the whole, that debtor is insolvent, and it is for the best interests of his creditors that his assets be divided under the act. A warrant issues for attaching all his property in the State and forbidding any disposition of it. Notice is given to the debtor, and the warrant may be revoked on hearing. If not, a like warrant issues as in voluntary proceedings. (§ 17.) The messenger takes possession of the estate and notifies the first meeting of creditors, who then choose an assignee by majority in number and value, subject to the approval of the judge, who may set aside, order a new election, appoint others, or remove for cause. Assignees are required to give bond. (§§ 18, 31, 32.)

Claims may be proved at any time before final dividend, as follows: All debts, with rebate of interest on those not yet payable, unless interest is provided. Demands for conversion of personal property. Contingent liabilities share, if they become fixed before final dividend, or present value may be determined. Any person liable as surety, etc., may have benefit of dividend, whether the creditor proves or not, by proving in his name or otherwise. Debts like rents falling due at stated periods may be apportioned.

Proof is made before the register of the insolvent court without expense, or before any justice of the peace or notary public at the creditor's expense, by the creditor or his authorized attorney, in the following form:

STATE OF MAINE, }
COUNTY OF } ss. Court of Insolvency.

In the case of insolvent debtor. I, of in the county of do swear that the said by or against whom proceedings in insolvency have been instituted in said court for said county of at and before the commencement of such proceedings still justly and truly indebted to me in the sum of dollars and cents; that the evidence of said debt is hereto annexed and marked "Exhibit A;" that the consideration for said indebtedness was and is that the credit to be given upon said claim is that I hold as security upon said claim a copy of which is hereto annexed and is marked "Exhibit B;" that this is the only security I hold upon said claim, and I have not nor has any other person for me to my knowledge and belief received any other security or satisfaction whatever in the premises.

And I do further swear that said claim was not procured by me for the purpose of influencing the proceedings in this case.

And I do further swear that I have not, nor has any other person to my knowledge or belief, directly or indirectly, entered into any bargain or agreement, expressed or implied, whereby I am to receive any exclusive benefit hereafter, or whereby my vote for assignee, or my assent to the said debtor's discharge, or any action on my part in such proceedings, has been, is, or shall be in any way affected, influenced, or controlled. (Deposing creditor.)

STATE OF MAINE, }
COUNTY OF } ss.

A. D. 18 .

The foregoing proof was made and subscribed and sworn to this day by the said

Before me, Register for said court for said county of (or notary public or justice of the peace).

No debts but those provided for can be proved. Unliquidated damages on contracts or for torts are assessed. Any person accepting illegal preference cannot prove without surrendering same. (§§ 25-29.) Attachments made within four months are dissolved, unless prosecuted by assignee at his election for benefit of the estate. Mortgages not recorded within three months are avoided. Money paid on writ, judgment, or execution within two months, as a preference, may be recovered by the assignee if creditor knew of insolvency. Transfer of any kind as a preference, by debtor, within four months, if insolvent or in contemplation of insolvency, are void, if known to creditor to be such, and the property or its value may be recovered by assignee. If not in usual course of business it is *prima facie* evidence of illegal preference. Loans on security taken at the time in good faith are upheld. (§§ 33, 52.)

Estate is applied: 1. To costs of proceedings; 2. To taxes and debts due town, county, State, or United States; 3. To wages of operative earned within six months, not over fifty dollars; 4. As often as enough is received, twenty-five per cent is paid on other claims, and final dividend when ordered by the court. (§§ 39, 40.) The debtor and any other person may be examined. (§ 42.)

Discharge is granted from all debts provable except those created by fraud or embezzlement, defalcation as a public officer, or in any fiduciary capacity; does not release any person jointly liable with debtor; is not granted a second time unless a majority, nor a third time without three-fourths of his creditors in number and value assent. (§§ 44-49.) Discharge is denied if debtor has: 1. Sworn falsely; 2. Concealed property, books, or papers; 3. Paid or secured any debt or liability of or for him within the prohibited four months; 4. Caused his effects to be attached; 5. Destroyed, altered, mutilated or falsified books or papers; 6. Been privy to any false or fraudulent entry; 7. Removed or allowed removal of his property—either of the foregoing being with intent to defraud his creditors or to give an illegal preference; 8. Made any fraudulent transfer of property; 9. Known of any fictitious debt proved against estate and has not disclosed the same; 10. Failed to keep proper books of account since the passage of the act, if a merchant or trader. Discharge is void if assent of creditor is procured by pecuniary consideration or promise for the future, and may be annulled within two years after it is granted if causes were not known at time of discharge. (§ 49.) Suits and arrest are suspended pending insolvency proceedings. (§ 51.) Composition may be affected by an affidavit of the debtor negating fraud, preference, or promise of same and an agreement signed by majority in number of the creditors whose debts exceed fifty dollars each, and by creditors holding three-fourths of all his indebtedness, and a discharge is granted, which is void if any signature is obtained by fraud, or any material statement in affidavit, or schedule of debtor is false to his knowledge. (§ 62.) If discharge is not valid debt may be collected, less dividends.

Penalties are provided against debtor for concealing property and papers; against others for aiding the same or making fraudulent purchase or agreement to purchase; against messenger and assignee for fraudulently disposing of estate. In each case the penalty is imprisonment not more than one year or fine of not over five hundred dollars. (§§ 53-56.)

Partnerships may be declared insolvent; either partner may file petition. Estates of each member are kept separate and applied to the claims against the estates respectively; assignee is chosen by partnership creditors. Discharge is granted or refused to each partner separately. (§§ 57-60.)

Corporations are subject to these provisions if carrying on any private business; not to include corporations engaged in a business involving public duties and obligations, among which are railroads, banks, gas and water companies. Corporation is not discharged nor liability of stockholders affected. (§ 61.)

Allowance may be made to the debtor for support out of estate pending proceeding.

The judge in any county may examine witnesses and compel attendance.

Appeals lie to the supreme judicial court from decisions upon granting and annulling discharge, and allowing claims, which may be tried by jury, and exceptions taken and determined by law court. (§§ 12, 25, 44, 49.) The same court has full equity jurisdiction in all matters arising under the act.

Assignments may be made to the register of the court by persons owing less than three hundred dollars. The assignor submits to an examination by creditors which is limited to the time since debts accrued. If the examination is not found to be untrue or inconsistent with the oath, which is in substance that he has not made over or concealed property to defraud, the oath is administered and the debtor is discharged from arrest on any debts then existing, but not from debts. (§ 64.)

Assignments for benefit of creditors are held void in cases within scope of insolvent law. (*Smith v. Sullivan*, 71 Me., 150.) There is no statute providing for such assignments.

Assignments (MARYLAND)—INSOLVENT LAW.—The insolvent law of the State is contained in the Revised Code of 1878, art. 67, as amended by the act of 1880, ch. 172, and of 1884, ch. 295. Any person, being insolvent, may apply for the benefit of the insolvent law by petition to the circuit court for the county where he resides or to the court of common pleas of Baltimore city, if he resides in the city of Baltimore, stating that he is insolvent, and offering to deliver up for the benefit of his creditors all his property, real and personal, and exhibiting therewith a schedule of his property and a list of the debts due from and owing to him, with the names of his debtors and creditors and their respective places of business or residence so far as known to him, all verified by affidavit; but no person can so apply if he has at any time within two years previously been discharged under any insolvent law of the State.

Any person who shall depart from or remain absent from the State with intent to defraud his creditors, or conceal himself to avoid service of process upon him in any action for the recovery of a debt, and any person who conceals or removes any of his property to prevent the same from being taken under legal process, or makes any assignment, gift, sale, conveyance, or transfer of all or part of his estate or property with intent to delay, hinder, or defraud his creditors, or, being a banker, broker, merchant, manufacturer, or trader, when insolvent or in contemplation of insolvency, executes a deed or conveyance giving preference, creates a lien making any unlawful preference, or otherwise gives such preferences, or, belonging to said last mentioned classes, when insolvent or in contemplation of insolvency, confesses any judgment or allows any judgment to be entered against him by any connivance, or, belonging to any of said classes, when insolvent or in contemplation of insolvency, fraudulently stops payment or suspends payment of his negotiable paper and fails to resume the payment thereof within twenty days, or, being a banker or broker, shall fail, for twenty days, to pay any depositor on demand lawfully made, is deemed to have committed an act of insolvency, and may be declared insolvent upon the petition of one or more creditors the aggregate of whose debts against the insolvent amount to at least the sum

of two hundred and fifty dollars, at any time within sixty days after the recording of any of the conveyances, creation of liens, or committing of any of the acts of insolvency above specified. The petition must allege the facts upon which the application is grounded, and pray for process against the debtor and an adjudication of insolvency, and must be verified by the affidavit of the petitioner. A summons is thereupon issued for the debtor requiring him to show cause, within not less than five nor more than ten days, why such adjudication shall not be made. The act of 1884, ch. 295, saves such preferences in deeds, etc., as result from operation of law, and for wages or salaries to clerks or employees contracted not more than three months before the execution thereof.

After an adjudication of insolvency in either a voluntary or involuntary case, a preliminary trustee is appointed. Notice is then given to the creditors, by mail and advertisement, of a meeting to elect a permanent trustee. The creditors present at the meeting who have proved their claims proceed to the election of a permanent trustee, and the person who receives the votes of the greater number of creditors and of those holding the greater amount of indebtedness is elected permanent trustee, subject, however, to the approval of the court or one of the judges thereof. If the creditors fail to attend, or any person fails to obtain the requisite majority of number and amount of creditors, or if the person elected be in the opinion of the court an unsuitable person to execute the duties of the office of trustee, the court appoints some person to act as permanent trustee.

The permanent trustee is entitled to all the property, estate, rights, and claims of the insolvent of every description, except the necessary wearing apparel and bedding of the insolvent and his family, and such property as may by law be exempt from execution.

Any confession of judgment, and any conveyance or assignment made by any insolvent for the purpose of defrauding his creditors or giving an undue preference, is void; and all acts done by the petitioner before his application, when he shall have had no reasonable expectation of being exempted from liability to execution on account of his debts or responsibilities without petitioning for the benefit of the insolvent law, is deemed to be within the meaning and purview of the statute. No deed or conveyance executed or lien created by any banker, broker, merchant, manufacturer, or trader, being insolvent or in contemplation of insolvency, is lawful or valid if the same contains any preferences save such as result from operation of law, and save those for the payment of wages or salaries to clerks, servants, and employees contracted not more than three months anterior to the execution thereof; and all preferences save these exceptions are void, howsoever the same may be made, provided that the grantor or party creating the lien or preference is declared insolvent upon a petition filed either by himself or his creditors within sixty days after the recording of the deed or conveyance or the creation of the lien or preference.

A person who is declared an insolvent on the petition of his creditors is entitled to a discharge in the same manner and to the same extent as if he were declared an insolvent on his own petition. A discharge releases an

insolvent from all debts and contracts made before the filing of the petition, and embraces all cases where he is indorser or surety, and he is not liable to pay any joint contractor, surety, or indorser who may pay any debt or perform any contract after the filing of the petition which was entered into before the filing of the petition.

No person can be discharged who has conveyed, concealed, or disposed of his property to defraud or delay his creditors or prevent the same from being applied to the payment of his debts, or who has within one year of the time of the filing of the petition, by the conveyance or assignment of his property or debts or claims or payment of money, given an undue and improper preference to any of his creditors.

The insolvent law does not apply to married women. (55 Md., 97.) It is made applicable to copartnerships by act of 1884, ch. 295.

Assignments (MASSACHUSETTS)—INSOLVENT LAW.—(P. S., ch, 157.) The Massachusetts insolvent law is very similar to the United States bankrupt act of 1867. It provides for proceedings by petition to the judge of insolvency for the county within which the debtor, and in partnership cases one of the partners, has last resided for three consecutive months before the application. Voluntary proceedings may be instituted by an inhabitant of the State owing debts to the amount of two hundred dollars. Involuntary proceedings may be instituted by any creditor whose claim amounts to one hundred dollars, in the following cases and within ninety days thereafter: 1st, if the debtor, being arrested on mesne process in a civil action for not less than one hundred dollars upon a provable claim, has not given bail on or before the return day; or 2d, or if the debtor has been imprisoned more than thirty days in such an action; or 3d, if an attachment of his goods or estate on mesne process in such an action has not been dissolved before the return day; or 4th, if he has removed himself or any of his property from the State with intent to defraud his creditors; or 5th, has concealed himself to avoid arrest, or any of his property to prevent its being attached or taken on legal process; or 6th, has procured himself or his property to be arrested, attached, or taken on any legal process; or 7th, made any fraudulent payment, conveyance, or transfer of any part of his property; or 8th, if, being a banker, broker, merchant, trader, manufacturer, or miner, he has stopped or suspended and not resumed payment of his commercial paper within fourteen days; or 9th, if the debtor be insane and insolvent.

A hearing may be had upon the petition and the court may at once enjoin any disposition of the debtor's property and issue a warrant to the sheriff or one of his deputies as messenger to take possession of the property. Such warrant issues as of course in all voluntary cases, and after adjudication in involuntary cases. In all cases a deposit of forty dollars is required with the petition, to cover court fees and expenses.

The debtor must file schedules, under oath, of his debts and assets.

At the first meeting of creditors one or more assignees are chosen by a majority in value of the creditors who have proved their debts, claims preferred by the statute not being entitled, so far as preferred, to vote. The

form of proof of claim is prescribed in the statute; it must be sworn to by the creditor, if within this State, before a justice of the peace or notary public; if without the State, before a justice of the peace, notary public, or commissioner for Massachusetts, and if in a foreign country, before a minister, consul, or vice-consul of the United States.

[Form of Proof of Claim.]

STATE OF }
COUNTY OF } ss.

Court of Insolvency. In the case of insolvent debtor.

I, of do swear, that said by (or against) whom proceedings in insolvency have been instituted, at and before the date of such proceedings, was, and still is, justly and truly indebted to me in the sum of dollars, for which sum, or any part thereof, I have not, nor has any other person to my use, to my knowledge or belief, received any security or satisfaction whatever, beyond what has been disposed of agreeably to law.

And I do further swear, that the said claim was not procured by me for the purpose of influencing the proceedings in this case.

And I do further swear, that I have not, directly or indirectly, made or entered into any bargain, arrangement, or agreement, express or implied, to sell, transfer, or dispose of my claim, or any part of my claim, against said debtor, nor have, directly or indirectly, received or taken, or made or entered into any bargain, arrangement, or agreement, express or implied, to take or receive, directly or indirectly, any money, property, or consideration whatsoever to myself, or to any person or persons to my use or benefit, under or with any understanding or agreement, express or implied, whereby my vote for assignee, or my assent to the debtor's discharge, is or shall be in any way affected, influenced, or controlled, or whereby the proceedings in this case are or shall be affected, influenced, or controlled.

STATE OF }
COUNTY OF } ss.

Then personally appeared the above named and made solemn oath that the foregoing declaration, by him subscribed, is true. Before me, Justice of the Peace.

If proof is made upon a note, draft, or other instrument, the original must be annexed to the proof, but may be afterwards withdrawn on application to the register and filing a copy. An appeal lies to the superior court from the allowance or disallowance of claims.

Equitable liabilities are provable. (Stat. 1884, ch. 293.)

The following claims are to be first paid in full in their order, and at such time as the judge may direct: 1st. Debts due to the United States and debts due to and taxes assessed by this State, or any county, city, or town therein. 2d. Wages due operatives, clerks, and servants, to an amount not exceeding one hundred dollars, for labor performed within one year prior to the insolvency. Also such wages due any operative from another operative of the debtor, payment thereof to be charged to the account of the principal operative, and not to exceed the amount due him and entitled to priority. 3d. Debts due physicians for attendance on debtor or his family within six months, to an amount not exceeding fifty dollars. 4th. Debts due to any person who by the laws of the United States or of Massachusetts is entitled to priority. 5th. Legal fees, costs, and expenses of suit and attachment and custody of the debtor's property.

The assignment vests in the assignee all the property of the debtor, real and personal, which he could have lawfully sold, assigned, or conveyed, or which might have been taken on execution upon a judgment against him at the time of the first publication of the proceedings. All attachments are dissolved, except those made more than four months prior to the first publication of the proceedings. Second and third meetings are held within three and six months respectively from the date of the warrant. The debtor must submit to examination on oath.

At an adjournment of the third meeting held more than six months after the first meeting, the debtor may obtain his discharge from all debts actually proved, and from all provable debts due to any person resident in Massachusetts at the time of the first publication of the insolvency. Claims for necessities furnished the debtor or his family are not discharged unless proved. There is a special provision for the acceptance or rejection of leasehold property by the assignee, for the discharge of the debtor from his liability under the lease, and for the proof by the lessor of his damages. (P. S., ch. 157, § 26.) The discharge will be refused for certain specified frauds and preferences.

If the estate does not pay fifty per cent the debtor must, within six months after the assignment, file the assent in writing of a majority in number and value of his creditors, who have proved their claims, not including preferred claims (that is, claims entitled to priority), so far as the same have been paid in full; and, in case of a second insolvency, the assent of three-fourths in value. No discharge will be granted to a debtor a third time insolvent.

Stat. 1884, ch. 236, amended by Stat. 1885, ch. 353, provides for a *composition with creditors* in insolvency substantially as in the late United States bankruptcy act.

Debts *due to citizens of other States*, if proved, are barred by the debtor's discharge in insolvency, but if not proved, they are not barred, and suit may be brought thereon, but the debtor cannot after discharge be *arrested* in this State on such claims; nor can his property, acquired subsequently to the first publication of the insolvency proceedings, be *attached* thereon in this State; *it can, however be taken on execution*.

Suits upon claims sold by assignees are to be brought in the name of the purchaser, the fact of sale and purchase being set forth in the writ.

In other cases, except upon claims sold by executors or administrators, suits upon choses in action, including claims sold by assignees under the late bankrupt act, must be brought in the name of the assignor.

Assignments in Massachusetts for the benefit of creditors are repugnant to the insolvent law, and voidable.

Assignments (MICHIGAN).—The right to make a common law assignment is still recognized, but the legislature of 1879 (Sess. Laws, p. 181; H. S., p. 2137,) passed an act providing that all such assignments should be void unless without preference as between creditors, and it must be of all property not exempt from execution. Within ten days after making an assignment, the original or a duplicate with a schedule of property assigned and a list of

the creditors, together with a bond for faithful performance of the trust, shall be filed in the office of the circuit court clerk in the county where the assignor resides. If he is a non-resident, then in the county where the assignee resides. If both are non-residents of the State, then in the county where the assigned property is chiefly located. No title passes to the assignee until the bond has been approved by the clerk and filed. Between the date of the assignment and the time limited for filing the bond, no attachment or execution shall be valid or create any lien. The assignment must be acknowledged.

This law was added to and amended by an act which took effect June 11th, 1881. The first section remains as above. Following is a synopsis of the balance of the act as it now stands:

The inventory must be a detailed statement, as near as may be, of the general description, value, and location of the property and rights assigned. When the assignment is by a firm and the assigned property consists wholly or partly of goods, wares, merchandise, materials, fixtures, and furniture, or any of them, the inventory must also contain, as near as practicable, the original cost in addition to the first mentioned requirements. The list of creditors must contain, as far as the assignor can state, the name and address of each, amount due over defenses, the actual consideration for the debt, date when contracted, and all securities held, if any, and their value. The inventory and list must be sworn to. The bond runs to the assignor for the joint and several use and benefit of himself and each, any, and all of his creditors, in a penalty double the value of the property assigned as shown by the inventory, and conditioned for the faithful administration of the trust. It must be signed by the assignee and by sufficient sureties who must justify before the clerk or circuit court commissioner, and testify that they are worth in the aggregate, above exemptions, incumbrances, and debts, the penal sum of the bond, and this justification is indorsed on the bond. The assignee or receiver within ten days gives notice personally or by mail to each creditor, and within ninety days must file proof thereof in the clerk's office. The notices must require creditors to prove their debts within ninety days and file such proof in the clerk's office, or in default the estate may be distributed within ten days thereafter without reference to claims not proved. At least ten days before making dividend there must be sent to each creditor whose name appears upon the schedule, and to each creditor who has proved a claim, a list of all claims proved. It must contain the name and address of each and amount claimed. No claim is entitled to dividend unless embraced in list so served. The assignee retains enough funds to pay contested claims and claims proved, but not on the list so served by him. No dividend can be paid on a claim while being contested.

The notice to creditors requires them to prove their debts within ninety days; but it is probable that debts may be proved beyond that period and share in the dividends with the remaining claims, if the estate has not already been distributed; and no reason is seen why a claim may not be proved at any time prior to distribution.

Proofs of claims must be sworn to and must state; 1. The actual sum unpaid and owing. 2. The actual consideration therefor. 3. When contracted. 4. When it became or will become due. 5. Whether any and what securities are held. 6. Whether any and what payments have been made. 7. That the sum claimed is justly due from the assignor to the claimant. 8. That the claimant has not, nor has any one for his use, received any security or satisfaction whatever other than that by him set forth. The requirements are not numbered in the statute as above, and are only done so here for convenience of statement. The assignee or receiver may contest any claim. Any creditor may by writing request any claim to be contested. The service of such request on the assignee or receiver stays payment of the claim. If the assignee refuses or neglects to contest any claim, the circuit court in chancery may by an order direct it to be done, upon a petition by the creditor making the request, verified by the oath of any one knowing the facts. The contest is instituted by service of a notice personally or by mail upon the claimant, stating the intention to contest his claim. Upon proof of such notice filed with the clerk, the matter is entered by such clerk on the law side as a cause by the claimant against the assignor. The cause is tried as other suits at law, the court allowing pleadings and amended pleadings to be filed. The court has the same power over the verdict as in other suits at law, except that no execution issues. The court directs the matter of costs as seems to it just. If awarded against the assignee, he pays out of funds in his hands. If the claim shall be established, dividend is paid upon it the same as others, together with interest, since dividends on others may have been paid.

The assignee must give notice of his intention to have his fees and disbursements allowed by service personally or by mail on each creditor. The notice must contain a statement of the disbursements and expenses and the sum intended to be asked as compensation, together with the time when the application will be made.

The circuit court in chancery of the proper county is given supervisory powers over all matters, questions, and disputes arising under any assignment, and may, on application of the assignee or any one interested, make all orders for the management and disposition of the assigned property, the distribution of the assets and avails, the recovery of all property claimed by third persons, and from time to time require new bonds or sureties.

The statute declares that every such assignment shall confer upon the assignee the right to recover all property, or right, or equities in property which might be reached or recovered by any of the creditors of the assignor.

Within three months the assignee files a report in the clerk's office containing a statement: 1. Of all property received by him; 2. The disposition made thereof; 3. Of all moneys received, disbursed, and on hand, with vouchers attached for all expenditures; and he shall make subsequent reports quarterly of the same kind. As soon as practicable after assignment he must have all property appraised by two disinterested, competent persons under oath and file the appraisal with the assignment.

In case of fraud in the assignment or in the prompt and faithful execution

of the trust or upon failure to comply with any provisions of the act, any person interested may file a bill in equity to enforce the trust. The court may appoint a receiver and may order a summary examination of the assignee or any witness at any stage of the cause.

The supreme court is inclined to a liberal construction of this law, and has shown a disposition to uphold it if possible.

A law was passed in 1883 referring to assignments, both voluntary and involuntary, under which a creditor accepting the dividend which the estate would pay was compelled to file a release of the balance of his claim. The supreme court has held this law to be unconstitutional and it is now omitted. The result is that the condition requiring a release, contained in assignments made prior to the decision, is not enforceable, and it is doubtful, whether release granted before the decision would be binding, since it is not clear that they were based upon any sufficient consideration.

Assignments (MINNESOTA).—An assignment for the benefit of creditors must be in writing, subscribed by the debtor, acknowledged same as a deed, and filed in the office of the clerk of the district court for the county wherein debtor resides, or wherein the business with reference to which the same is made has been principally carried on. The assignee must be a resident and freeholder of this State. Unless all these conditions are strictly complied with the assignment is void. Debtor is required, within ten days after making assignment, to file with the clerk aforesaid an inventory, under oath, containing the account of all creditors, with place of their residence, if known, the amount due to each, nature and consideration of such indebtedness, where it arose, whether secured or not, and, if so, how; and also a complete inventory of debtor's property, with the value of each item thereof, according to his best belief. Failure to file inventory within the specified time does not defeat the proceeding or avoid the trust. (*Swart v. Thomas*, *Northwestern Reporter*, 830.) The assignee, before he can sell or convert to the purposes of the trust any of the trust estate, and not later than five days after filing of inventory as above provided, must execute bond to the State of Minnesota, to be approved by said court, with two or more sureties residents and freeholders of this State, in at least double the value of the property so assigned, for the faithful performance of his duties. If the bond is not given within the time limited the assignment becomes void. (*Kingman v. Barton*, 24 Minn., 295.) Notice of assignment must be published, and also mailed to each creditor. No claim except debts to the United States or State of Minnesota, or for taxes or assessments, can be paid unless it is verified by oath of party making it. All debts must be paid in the following order: 1st. Debts due the United States, the State of Minnesota, and all taxes and assessments levied and unpaid must be paid in full before the payment of any other debt. 2d. Debts for wages of servants, laborers, mechanics, and clerks, for services performed for debtor within three months next before date of assignment, must be paid in full to the exclusion of all other indebtedness. If trust property is insufficient then they are to be paid *pro rata*. The proof of claim of any such creditor must show character of serv-

ice and when performed. 3d. All other debts properly proved stand on same footing, except that creditors holding secured claims must first exhaust their security or surrender same to assignee before they can share in trust property. All proceedings are subject to the order and supervision of the judge of said court, to whom any creditor may apply, by petition, for distribution or other relief, and such judge may for cause remove any assignee and appoint another in his stead. When assignee has performed his trust or been removed, he may be discharged by order of court from further liability, upon application therefor, with notice of three weeks by publication of such intended application. (Laws of 1876, p. 62, as amended by Laws of 1877, p. 109; G. S. 1878, ch. 41, §§ 23-29.) Or when said trust estate shall be taken out of his hands by any legal proceeding in court, or shall be declared void as to creditors, or the further administration of said trust shall be impracticable, inadvisable, or nugatory, and upon such notice as shall be required by the court, the assignee may be discharged. (Laws of 1885, p. 81.)

In all cases of general assignments for benefit of creditors, the assignee shall be considered as representing the rights and interests of creditors as against all transfers of property which would be fraudulent or void as to creditors, and has all the rights of the creditors in avoiding any such transfer. (Laws of 1877, p. 237; G. S. 1878, ch. 41, § 270.) No provision for discharge of debtor from his debts, and personal judgment may be taken against him, notwithstanding the assignment, except as provided in the insolvent law of 1881, which see.

The foregoing embraces the substance of our statutory provisions relating to assignments. In practice the debtor selects his own assignee. The only notices provided by the statute are the notice of assignment given in first instance, and notice of application for final discharge. Only effect of failure to prove claim before assignee is to be debarred from participating in dividends. If claim is rejected by assignee we think application for allowance may be made to the court having supervision. The statute is silent as to exemptions, and as to preferences, except as above noted, and except as provided in the insolvent law above referred to, which must be read in connection with this subject. Whether preferences, other than as above, would be sustained, or by implication are forbidden, is an open question. There is no time limited for paying dividends or closing out the estate, but the matter is under the control of the court, which makes all proper orders. The assignment or proof of debt before assignee does not debar the right of action at once on same claim. There is no statutory provision as to examination of debtor, or as to punishment for fraud.

INSOLVENT LAWS.—When a debtor's property is attached or levied on by virtue of a writ issued out of a court of record of this State (except upon execution where the complaint has been filed twenty days prior to the entry of judgment), such debtor may, within ten days thereafter, make an assignment for the equal benefit of all his creditors, which assignment shall have the effect of dissolving such levy or attachment. If he fails or refuses to do

sò, and does not in good faith institute proceedings to vacate the attachment or garnishment, or defend himself against the same within the time specified; or if he confesses judgment, or does any act by which any of his creditors might obtain a preference over others in the payment of their claims, or omits to do any act which he may lawfully do to prevent creditors from obtaining a preference, then, or within sixty days thereafter, upon the petition of any two creditors having claims amounting to two hundred dollars in the aggregate, to the district court, the judge thereof, upon evidence showing the debtor to be insolvent, or that he has been giving, or is about to give, a preference to any of his creditors, or has refused or neglected to make an assignment as above specified, shall appoint a receiver to take charge of the property belonging to such debtor. No assignment shall give any creditor a preference except in cases expressly provided by law. Confessing or suffering judgment to be procured for the purpose of preferring creditors is a misdemeanor.

The court may restrain the debtor from collecting bills, keep him within the State, and compel him at any time to make full disclosure as to any matters pertaining to the estate. Conveyances and payments made and securities given by the debtor within four months prior to the assignment with a view of giving a preference to any creditor, are void; provided such creditor had reasonable grounds to believe the debtor was insolvent. Before creditors can share in the distribution, they must file with the clerk of the district court a release in full to the debtor, who may thereupon be discharged by the judge from all liability to the creditors so participating; provided it does not appear he has secreted property with fraudulent intent. All proceedings must be commenced in the county where the debtor resides, if he is a resident; if not a resident of this State, then the action may be brought in any county the plaintiff may designate in his complaint. Creditors may appeal to the district court from the disallowance of their claims by the assignee or receiver. They are entitled to notice, personally or by mail, of such disallowance, and may appeal therefrom within ten days after personal service, or within twenty days after service by mail. (Laws of 1881, p. 193.)

Assignments (MISSISSIPPI).—Assignments are not regulated by statute. The general principles of equity jurisprudence control. When made they do not affect the lien of attachments previously levied.

INSOLVENT LAWS.—There are no insolvent laws in Mississippi. In settling the insolvent estates of parties deceased, adjudicating conflicting claims of creditors under general assignments, etc., the courts administer the rule of partnership assets to partnership debts, and individual assets to individual debts.

Assignments (MISSOURI) OR INSOLVENT LAWS.—There is a statute in this State under which a debtor may make a voluntary assignment for the benefit of all his creditors. The estate so assigned must be administered by the assignee under the direction and supervision of the circuit court. The debtor, however, cannot be discharged by reason of the assignment and proceedings

thereunder, unless the estate assigned pays all the debts, or unless the creditors all assent to such discharge.

The assignment is by deed acknowledged and recorded as other deeds are, and also in the county where the debtor resides. With the assignment deed there must also be filed an affidavit of the assignor, his agent or attorney, setting forth the general nature and full value of the estate; and within three days after filing such deed and affidavit the assignee is required to give bond with at least two good securities to be approved by the circuit court, or judge or clerk thereof in vacation, in double the value of the estate so assigned; and if afterwards the appraisement of such estate shall be greater than the amount specified in the affidavit so filed by the assignor, his agent or attorney, then the assignee is required to give another bond covering double the value of the property as appraised. The assignor names the assignee. The assignee may be dismissed from the trust for cause by the circuit court wherein the inventory is filed; and that court has power to appoint a successor to such assignee. Within fifteen days after the execution of the deed of assignment the assignee is required to file an inventory of the estate of the debtor in the clerk's office of the circuit court of the county where the debtor, or one of them, if there be several, resides. The judge of the circuit court may, for good cause shown, extend the time for the filing of the inventory. The inventory must be sworn to by the assignee. Upon the filing of the inventory the court, or judge or clerk in vacation, is required to appoint two or more disinterested persons to appraise the estate. The appraisers, after being sworn, are required to file their appraisement within five days after they have completed the same. If the inventory is not filed as required by law, the court may compel the assignee to file it, or dismiss him from the trust; within three months after the date of the assignment the assignee is required to appoint a day and place at the county seat, or such other place in the county most convenient to all parties in interest and where any court of record may be lawfully held, when and where he will proceed publicly to allow demands against the estate. Four weeks notice is required, to be given by advertisement published in some newspaper printed in the county, the last insertion of the publication to be at least one week prior to the day named for the allowance of demands. Notice is also to be given by letter to all known creditors four weeks before the day named. On the day named and the two days following the assignee is required to attend at the place named between nine o'clock A. M. and five o'clock P. M. and hear demands. The assignee has power to administer oaths, and can require only such evidence to establish demands as would be required in court in suits between the original parties to the contract. The failure to present demands precludes such demands from the benefit of the estate. Creditors who have not presented their claims on either of the days named on account of sickness, absence from the State, or other good cause, may, however, before the final dividend is declared, prove up their claims and receive "the remaining dividends" thereon as in the case of other allowed claims.

If any demands are rejected by the assignee, in whole or in part, the creditor may appeal to the circuit court, which appeal must be applied for to and

allowed by the assignee in the same manner that appeals are taken from the decisions of justices of the peace. Any creditor may in like manner appeal from the action of the assignee in allowing demands to other creditors.

In making the assignment there can be no preference to any creditor. All existing liens at date of assignment are preserved, except that judgment entered by confession thirty days previous to the assignment must be paid from the assets thereof *pro rata* with other debts. This will include attachment liens if the attachment is sustained on plea in abatement. If a creditor attaches because of the assignment and is defeated on plea in abatement of his attachment, he cannot share in the benefits of the assignment. But debts due the State have priority over other creditors. The assignor may reserve his exemptions, and the court will order the exempted property set aside to him. All sales by the assignee are to be made under the direction of the court.

Within one month after the allowance of demands, and as often thereafter as the assignee has on hand sufficient funds to make a dividend of five per cent, the assignee must declare and pay dividends on the allowed claims. No claims are preferred in paying dividends. The dividends are applied as partial payments of the creditors' demands. The assignee is required at every term of court to settle with the circuit court, and while no certain period is fixed within which the estate is to be closed, the assignee may make an application for a discharge, or be ordered so to do by the court when it is no longer advantageous to keep the estate open. Debtor is not required to submit to any examination. Foreign and home creditors are treated alike. There is no provision for a composition or discharge of the debtor, nor is there any provision in the statute concerning voluntary assignments for the punishment of fraud.

Assignments (MONTANA)—INSOLVENT LAWS.—There has been no legislation whatever on the subject.

Assignments (NEBRASKA)—INSOLVENT LAWS.—The act of 1877 (C. S., pp. 60-64) has been repealed by the act of 1883, which took effect June 1st, 1883. (Laws, 1883, p. 67.) The following are cases decided under the old act, and may be useful under the new: 7 Neb., 281; 9 Ib., 40, 353; 10 Ib., 217, 511, 594.

No voluntary assignment is valid unless made according to this act. (Laws, 1883, p. 67, § 1.) Every such assignment shall be of all real and personal property, except what is exempt from execution. (§ 2.) The real estate shall be described as definitely as in ordinary conveyances. (§ 3.) The personal property claimed as exempt shall be separately specified and described. (§ 4.) The sheriff, and his successor in office, of the county in which the assignor resides, shall be the assignee. (§ 5.) The assignment shall be by deed, and shall be filed for record within twenty-four hours of its execution; shall be recorded in every other county where land lies within thirty days. A failure to record within time avoids the deed as to the property situated in the county where such failure took place, and if the fault of the failure is on the assignee, he shall be liable for the amount of the prop-

erty as to which such assignment shall be avoided. (§ 6.) The sheriff is liable on his bond for the assigned property, and shall take immediate possession thereof. (§ 7.) Within ten days assignor shall file inventory and statement of debts and credits with county judge. (§ 8.) Within fifteen days thereafter, county judge shall have meeting of creditors at his office to choose assignee to succeed sheriff. (§ 9.) Assignee must be chosen by majority in value and one-third in number of creditors, and only creditors who have verified their debts on oath can vote. (§ 10.) The meeting can be adjourned from day to day for three days, and in case of failure to choose the sheriff remains assignee. (§ 11.) Immediately after meeting, the sheriff and the assignee shall return inventory and appraisement into county court. (§ 12.) Within forty-eight hours after, the assignee shall enter into an undertaking in double amount of appraised value of whole estate, with one or more sureties to be approved by county judge, conditioned for the faithful discharge of his duties as such assignee. Failure to give this bond avoids the election of assignee. (§ 13.) The bond shall be recorded, etc. (§ 14.) Then sheriff shall quitclaim and deliver to assignee. (§ 15.) All claims shall be filed at time to be fixed by county judge, not less than thirty days nor more than sixty days after meeting of creditors, and all claims not filed within the time are "forever barred." (§ 16.) Next day after time for filing all uncontested claims shall be allowed, and pleadings as in other cases, as near as practicable, shall be made on contested claims, and afterward, not exceeding sixty days, trial. (§ 17.) Procedure on contested claims. (§ 18.) Appeals in contested claims allowed to district court. (§ 19.) Assignee shall sell the estate as a sheriff, upon execution, and the procedure is similar, except that the property must bring appraised value, unless by written consent of majority in value of creditors. (§ 20.) Assignee shall report sale to county court, and make like report between first and fifth days of every month. (§ 21.) On three months and at other time county court shall order distribution of money in assignee's hands, and can enforce order by attachment. (§ 22.) When entire estate is converted into money, final distribution shall be ordered and enforced in like manner. (§ 23.) Money shall be distributed as follows: 1. Taxes and assessments. 2. Fees and allowance to assignee, county judge, sheriff, and officers. 3. Preferred claims. 4. Balance among creditors *pro rata*. (§ 24.) For procedure in cases of delays in contested claims, and final distribution thereafter, and discharge of assignee, see §§ 25-27. Fees allowed in assignments. (§ 28.) Every assignment shall be void, if it gives a preference among creditors, except for labor or wages not exceeding one hundred dollars to any person, or if it require any creditor to release or compromise his demand, or if it reserve any interest in the assigned property, or if it confer any power on the assignee different from the statute, or if the assignor fails to make the inventory required. But an omission of any property will not avoid assignment. (§ 29.) Fraudulent conveyance by assignee. (§ 30.) Assignee may be cited to account or removed. (§ 31.) Copartnership property may be assigned without including undivided property. (§ 32.) Assignment shall not affect rights of creditors to pursue any remedy at law or in equity to collect his claim, neither

shall the proving of his claim prevent his attacking validity of assignment. (§ 33.) Assignor may be cited to account and declare under oath. (§ 34.) Third persons suspected of having property of assignor may be cited and compelled to account. (§ 35.) Full jurisdiction in county court to carry out provisions of the statute, and for that purpose is always open for business. (§ 39.) Fraudulent conveyances by assignor void. (§§ 42, 43.) Clerks' and servants' wages protected. (§ 44.) Frauds of assignor made penitentiary offenses. (§ 45.) Act of February 19th, 1877, repealed, with saving clause as to previous assignments. (§ 46.)

Assignments (NEVADA)—INSOLVENT LAWS.—*Voluntary Insolvency.* An insolvent debtor may petition the judge of the district court having jurisdiction in the county where such petitioner shall have resided at least one year immediately preceding such application to be discharged from all his debts and liabilities. His debts and liabilities must exceed five hundred dollars. He must annex to his petition a schedule and inventory containing a true statement of all his debts and liabilities owing by him, giving the names of his creditors if known, the amount due to each creditor, the cause and nature of such indebtedness, when and where it accrued, and a statement of any existing judgment, mortgage, collateral, or other securities for the payment of such debt. Said schedule shall also contain a full, complete, and perfect inventory of all his property, real, personal, and mixed, of all choses in action, debts due or to become due, and all moneys in hand of or belonging to said insolvent, and shall contain a full statement of all incumbrances existing upon the property of the insolvent. The debtor shall as nearly as possible estimate the property by him surrendered and set forth in the schedule at its true cash value.

The schedule shall be signed by the debtor, and by him sworn to before the judge having jurisdiction. The judge to whom the application is made shall make an order staying proceedings, and requiring all the creditors of such insolvent to show cause, if they can, why an assignment of the insolvent's estate should not be made and he be discharged from his debts. The order appoints a time and place for a meeting of the creditors, and must be published by the clerk in a newspaper published in the county for at least thirty days before the date appointed for the meeting of creditors. A copy of such notice shall be deposited in the post-office, postage prepaid, and directed to the said creditors, at their places of residence.

All legal mortgages and liens *bona fide* on the property of the insolvent at the time of the surrender as aforesaid shall remain good and valid, and may be enforced in the same manner—due notice being given to the assignee—as though no such surrender had been made. (As amended February 18th, 1885.)

The creditors when they meet, after having certified on oath that their respective claims are legitimate and true, may appoint an assignee; the opinion of the majority of the amount shall prevail. The judge shall require from the assignee a bond, with two or more sufficient sureties. If the creditors fail to meet on the day required and appoint assignee, the judge appoints the sheriff of the county such assignee.

The assignee, when appointed and qualified, is vested with all the title to the debtor's property, except such as has been set apart for the use of the insolvent and his family, by an instrument under the seal of the court. The assignee must convert the estate into cash as soon as possible.

Involuntary Insolvency.—An adjudication of insolvency may be made on the petition of five or more creditors residents of this State, whose debts or demands accrued in this State, and amount in the aggregate to not less than five hundred dollars, provided that said creditors or either of them have not become creditors by assignment within thirty days prior to the filing of said petition. The petition must be filed in the district court of the county in which the debtor resides, or has his place of business, and must be verified by at least three of the petitioners, setting forth that such debtor is about to depart from the State with intent to defraud his creditors; or, being absent from the State with such intent, remains absent, or conceals himself to avoid the service of legal process; or, being insolvent, has suffered his property to remain under attachment or legal process for four days, or has confessed or offered to allow judgment in favor of any creditors, or willfully suffered judgment to be taken against him by default, or has suffered or procured his property to be taken on legal process with intent to give one or more of his creditors preference, or has made an assignment, gift, grant, sale, conveyance, or transfer of his estate, property, rights, or credits, or has been arrested or held in custody by virtue of any civil process of court, founded on any debt or demand, and such process remains in force and not discharged by payment or otherwise for a period of four days; or, being a merchant or tradesman, has stopped and suspended, and not resumed payment within a period of forty days after maturity of any written acknowledgment of indebtedness, unless the party holding such acknowledgment has in writing waived the right to proceed under this subdivision; or, being a bank or banker, agent, broker, factor, or commission merchant, has failed for forty days to pay over any moneys deposited with or received by him in a fiduciary capacity, upon demand of payment; except savings and loan banks, who loan the money of their stockholders and depositors on real estate, and provide in their by-laws for the repayment of such deposits.

The petition shall be accompanied by a bond with two sureties in the penal sum of at least five hundred dollars, conditioned for the payment of all costs and a reasonable attorney fee, in case the debtor shall not be declared an insolvent. Upon the filing of the petition the court issues an order requiring the debtor to show cause, at a time and place to be fixed by the court, why he should not be adjudged an insolvent.

If the debtor make default, or if after the trial issues are found in favor of petitioners, the court shall order the debtor to file schedule and inventory as provided in cases of voluntary insolvency. If the debtor fail to appear or cannot be found, the schedule and inventory may be prepared by the sheriff, or by the assignee, from the best information he can obtain.

Insolvency of Partnerships and Corporations.—Two or more persons who are partners in business may be adjudged insolvent, either on the petition of such partners, or any one of them, or on the petition of five or more of the

creditors of the partnership. In such case the court directs the partnership stock and property, and also the separate estate of each of the partners, excepting such parts thereof as may be exempt by law, to be surrendered as hereinbefore provided. The assignee when chosen shall keep separate accounts of the joint stock or property of the estate and of the separate property or estate of each member thereof. After deducting all expenses, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors. If there be a balance of the separate estate of any of the partners left after payment of his separate debts, the same shall go to the payment of the partnership creditors.

The provisions of the insolvent act apply to corporations; and upon petition filed like proceedings are had as in the case of insolvent debtors. Whenever a corporation is declared insolvent all its property and assets shall be distributed to the creditors, but no discharge shall be granted to any corporation.

Discharge.—A discharge may be applied for at any time after the expiration of thirty days after the meeting of creditors and appointment of assignee. Any creditor may oppose the discharge, and have issues made up and tried by the jury. No discharge shall be granted where the debtor has committed fraud or sworn falsely. If any debtor shall be convicted of having at any time within three months next preceding his failure sold, engaged, or mortgaged any of his goods and effects, or of having otherwise assigned, transferred, or disposed of the same, or any part thereof, or confessed judgment in order to give preference to one or more of his creditors over the others, he shall be debarred from all the benefits of the insolvent act.

If the accusation of fraud brought against the debtor is declared to be ill-founded, or if no opposition be made within the time herein provided, and provided the said debtor has in all things complied with the provisions of this act, the said debtor shall be released and fully discharged from any and all debts until then contracted, and contracted after the passage of this act, and from any judicial proceedings relative to the same, provided, always, that said insolvent debtor shall be released and discharged only for such debts and liabilities as he shall have set forth in his schedule.

In case the debtor who applies for the benefit of the act should already have received the benefit thereof, he shall not be entitled to his discharge unless the property surrendered by him amounts to at least fifty per centum of his liabilities, except three-fourths of his creditors in number and amount consent thereto. (Act approved March 3d, 1881.)

Assignments (NEW HAMPSHIRE) FOR THE BENEFIT OF CREDITORS—Must include all the debtor's property, except what is exempt from attachment for the equal benefit of all his creditors, and must be made to the judge of probate of the county where the debtor resides, and to such assignee as he may appoint must be under seal, sworn to in the form prescribed, and filed with the judge or register of probate of the county. If real estate is

included in the assignment, it must be witnessed and acknowledged as is required for deeds of real estate. The debtor must file in the probate office a list of the names and residences of all his creditors within ten days, and a schedule of all his property within fifteen days, after filing his assignment, which list and schedule must be verified by his oath to be true according to the best of his knowledge, information, and belief; and for willfully neglecting so to do, he may be punished by imprisonment not exceeding one year. When the schedule is filed the judge shall appoint a messenger to take possession of the property, and if any of it is perishable the messenger may sell it, and hold the proceeds for the assignee. The judge shall also fix a time when an assignee will be appointed and give notice thereof, personal and by publication, to the creditors. At the time thus fixed, the judge, upon recommendation of two-thirds in number and a majority in value of those creditors who have proved their debts, shall appoint some person, not a creditor, assignee. The assignee must give a bond for the faithful discharge of his duties, and forthwith give notice of his appointment; and within ten days after his appointment must file a schedule of all property embraced in the assignment, with a statement of the estimated value thereof and of the incumbrances thereon, verified by his oath to be true according to the best of his knowledge, information, and belief. The assent of all creditors to the assignment is presumed unless they dissent within thirty days after public notice thereof, and all actions of assenting creditors are discontinued and their taxable costs therein may be added to their debts in their proofs. Dissenting creditors take no benefit under the assignment. Attachments, payments, pledges, mortgages, (except those given to secure debts actually created at the time of the execution of the mortgages), conveyances, sales, (except those in the ordinary course of business), and transfers, made within three months prior to the assignment, and all payments, pledges, mortgages, conveyances, sales, and transfers, whenever made, that are fraudulent as to creditors, are void, and the assignee may recover and hold the property notwithstanding the same. Within six months after his appointment, and at such other times as the judge may direct, the assignee is required to settle his account in the probate court, of which settlements due notice must be given. Upon such settlements, the judge may order the balance in the hands of the assignee, or such portion thereof as he may deem proper, to be distributed among the creditors. Wages due to operatives, clerks, house servants, and other laborers, to an amount not exceeding fifty dollars, for labor performed within six months previous to the assignment, are paid in full; all other creditors receive a dividend in proportion to their respective claims. Creditors are required to prove their claims and file them in the probate office within one month after the assignment. The proof may be made by the creditor, his agent or attorney, and should be in the following form substantially. "I do solemnly swear (or affirm) that according to the best of my knowledge and belief the above is a true statement of my claim against and that I have not on my books, or elsewhere, any credit or any knowledge of any credit that should be allowed against my claim, except what is stated in the foregoing account. So help me God." All objections to claims must

specify the items objected to, with the grounds of objections, and be under oath of the party objecting, and must be filed within three months after said assignment unless further time, not exceeding two months more, is granted by the judge. The judge of probate, after notice to parties interested, shall hear and decide contested claims, from whose decision an appeal may be taken to the supreme court. A final settlement and distribution must be made within one year after the assignment, unless the judge shall grant further time with the written consent of a majority in number and value of the creditors. If the estate pays seventy per cent of all claims proved, the debtor may be discharged from all debts against him at the date of the assignment; if it pays less, he may be discharged upon written consent of three-fourths in number of his creditors who own three-fourths in amount of the debts against him. No debt contracted prior to August 28th, 1885, is affected by said discharge unless it is proved in the proceedings. A debtor who has been once discharged in proceedings of this kind is not entitled to a second discharge under like subsequent proceedings. The law also provides for a composition by the debtor with his creditors. One or more creditors having claims against a debtor amounting to three hundred dollars or more may institute proceedings against the debtor in the probate court and compel an assignment by him with the results above stated, if they satisfy the court that he is insolvent.

Assignments (NEW JERSEY) FOR THE BENEFIT OF CREDITORS.—**INSOLVENT LAW.**—Every conveyance or assignment made by a debtor of his estates, real or personal, or both, in trust to the assignee or assignees for the creditors of such debtor, must be for their equal benefit in proportion to their several demands, and all preferences of one creditor over another whereby any one shall be first paid, or have a greater proportion in respect to his claim than another, are deemed fraudulent and void, excepting mortgage and judgment creditors, when the judgment has not been by confession for the purpose of preferring creditors.

The assignment should be executed and proved or acknowledged in the same manner as deeds of real estate.

The debtor or debtors must annex to the assignment an inventory under oath or affirmation of his or their estate, real and personal, according to the best of his or their knowledge, together with a list of his or their creditors and the amount of their respective claims; but this inventory is not conclusive as to the *quantum* of the estate, but the assignee shall be entitled to any other property which may belong to the debtor at the time or be included in the general terms of the same.

The inventory and list of creditors must be proved before the surrogate and recorded in his office.

The assignee shall forthwith give three weeks public notice by advertising in two of the newspapers printed in this State circulating in the neighborhood where the creditors reside, and in one or more newspapers in any other State where it shall be known that any creditor of the assignor resides,

making known thereby that such assignment has been made and that the creditors present their claims under oath or affirmation.

The assignee shall also forthwith exhibit to the surrogate of the county wherein such debtor or debtors reside, under oath or affirmation, a true inventory and valuation of said estate so far as has come to his knowledge, and then and there enter into bond to the ordinary of this State, in double the amount of the inventory and valuation, with sufficient surety for the faithful performance of said trust, which bond, inventory, and valuation, being first filed in the surrogate's office, the assignee may then proceed to sell the estate, and perform every other duty necessary to carry out the intentions of the assignment.

After the assignee has given bond and the surrogate has indorsed the receipt of the bond on the deed of assignment, the deed may be recorded in the office of the clerk or register of the county, as the case may be, the deed having first been duly acknowledged or proved.

Claims must be presented to the assignee under oath or affirmation within three months from the date of the assignment or within such further time as the court may fix. (Laws of 1884, pp. 27, 183.) At the end of three months from the date of the assignment the assignee files a list of such creditors as have proved their claims, he having first advertised for six weeks next preceding the end of said term of three months or the period fixed by the court in two newspapers printed in this State, and by putting up advertisements in five most public places in the neighborhood wherein such creditors or a majority of them reside, making known that all creditors must prove their claims on oath or affirmation within the said period of three months from the date of the assignment. If any claim is objected to by the assignee or by another creditor, exceptions are filed and notice is given to the claimant and proofs are heard on both sides. A trial by jury may be had if desired by either party.

If any creditor shall not exhibit his claim within the time allowed, such claim shall be barred of a dividend unless the estate shall prove sufficient after the debts exhibited and allowed are fully satisfied, or such creditor shall find some other estate not accounted for by the assignee before distribution, in which case such creditor shall be entitled to a ratable proportion therefrom.

The debtor is not discharged from his liability to such of his creditors as may not choose to exhibit their claims, either as to the person of the debtor or as to any estate, real or personal, not included in the assignment; but such creditors as have come in and proved their claims are wholly barred from afterwards having any action at law or in equity against such debtor, unless on the trial or hearing of such action the creditor shall prove fraud in respect to the assignment or concealing his estate, real or personal, whether in possession, held in trust, or otherwise.

There is no distinction between foreign and resident creditors.

Debts to grow due may be proved with a rebate of interest.

At the first term of court after the time limited for proving claims, and

after disputed claims have been settled by the court, the assignee may proceed to make, from time to time, dividends of the assets which shall come to hand. A final account must be rendered as soon as possible, and at all events within one year. Two months notice of the settlement of the final account must be given to the creditors by advertisement.

The wages of clerks, minors, mechanics, and laborers due at the time of making the assignment are preferred debts to an amount not exceeding three hundred dollars to any one person. The landlord's claim for one year's rent is also preferred. In case of a debtor having a family, goods to the amount of two hundred dollars are reserved from the assignment.

There is no provision for the examination of the debtor. There is no special punishment provided for fraud in regard to the assignment.

The insolvent laws provide for the discharge of a person under arrest for debt or damages, on his delivering up to his creditors all his property, both real and personal. An assignee is appointed with ample title and powers. He acts under the direction of the court.

Assignments (NEW MEXICO).—There is no statutory provision on this subject. An assignment does not affect a levy upon execution or attachment prior to the assignment.

Assignments (NEW YORK) BY DEBTORS FOR THE BENEFIT OF CREDITORS.—There are, since the repeal of the bankrupt law, two methods of assignment open to debtors. These two kinds are often distinguished as insolvent and general assignments. The first method, provided by C. P., §§ 2149–2230, is for the purpose of obtaining a discharge from debts which will be valid within the State, (Story on Conf. Laws, § 348,) and is the creature of statute, which must be strictly followed. This statute provision is often spoken of as the two-thirds act, from the amount in value of petitioning creditors required by it. Its chief provisions are as follows:

The petition praying the discharge must be signed by the insolvent debtor and two-thirds in amount in value of his creditors in the United States. All signing creditors must make affidavit of the details and honesty of their claims, and consent to the petitioner's discharge. The insolvent must annex a verified schedule containing a detailed statement of his debts, names and residences of all his creditors, and an inventory of his estate. The petition may be presented to the county court of the county in which the petitioner resides, or, if he reside in New York city, to the court of Common Pleas. On presentation of the petition an order is made to show cause why the petition should not be granted. A notice of the contents of the order is served by publication, which must be made in designated newspapers either once a week for six weeks or once a week for ten weeks, depending on the residence of creditors. No other service of notice is necessary. On the return day of the order creditors have an opportunity to oppose the discharge of the insolvent, and can demand a jury to try the issues raised, and the insolvent is required to testify and produce his wife to testify before the jury.

Any unfair conveyance or preference will prevent the discharge; but if it appear to the officer, court, or jury that the statute has been honestly com-

plied with, an assignment is made to one or more trustees, residents of the State, nominated by a majority of the consenting creditors, or, if no one is so nominated, then by the court, and on certificate of the trustees that such assignment has been made, and certificate of the county clerk that such assignment has been duly recorded in his office, a discharge from debts issues to the insolvent. The discharge is to be void in case of fraud of the insolvent.

The second method of assignment above referred to is the common law right of a debtor to assign his property, which was first regulated by statute in this State by L. 1860, ch. 348. That statute as amended was repealed and supplanted by the statute of 1877, which last statute as amended now regulates general assignment. (L. 1877, ch. 466; L. 1878, ch. 318.)

It will be well to bear in mind that the following statute regulations do not apply to foreign assignments, but that an assignment valid by the laws of the State where made will give title to the assignee who takes possession of property here prior to attaching creditors. (54 N. Y., 29.) This proceeding does not discharge a debtor from his debts, though it contemplates the possibility of a composition. (§ 5, subdivision 6, as amended.)

A general assignment for the benefit of creditors must be written, acknowledged, and recorded in the office of the clerk of the county where the debtor resides or does business. In case of copartnership the assignment must be filed in the county where its principal place of business is located; and where the assignment embraces real estate in several counties, certified copies must be filed and recorded in those counties. In the city of New York it has been held that the assignment must also be recorded in the register's office in order to have the effect of a constructive notice as to real estate. (Simon v. Kalispe, 6 Abb. Pr. N. S., 225.)

The assignee must give a written assent to act as such, duly acknowledged.

No authority for one partner to execute an assignment of the firm property can be *implied* from the partnership relation, and an assignment so executed without authority will be void. (Welles v. March, 30 N. Y., 344.)

In reference to the granting of authority, Judge Cardozo laid down the following principles in *Nat. Bank v. Sackett*, 2 Abb. Pr. N. S., 286: 1st. An assignment of partnership property is valid, though not executed by all the partners, if power to assign has been granted or may be inferred. 2d. Such power will not be inferred where the non-executing partner is present. 3d. Mere absence of one partner will not give implied authority to the others. 4th. Fraudulent absconding gives authority.

As regards acknowledgment, the court of appeals (82 N. Y., 494,) declared valid an assignment made by an attorney in fact, properly authorized and acknowledged by him. This decision purported only to construe the act of 1860, ch. 348, but the wording of the recent act is the same in that respect, and the point may be considered settled.

The county judge and county court, or, in the city of New York, the court of common pleas and its judges, have jurisdiction over general assignments. By chapter 380, Laws of 1885, the powers of county courts and county judges under the assignment acts are conferred upon and may be exercised

by the supreme court and the justices of that court concurrently with the county courts and judges.

A verified inventory must be delivered by the debtor to the county judge within twenty days from the date of the assignment, stating the debtor's name, the names and residences of the assignee and creditors, and the amount and character of debts and assets. If the debtor neglects to deliver such inventory, the assignee has ten days further in which to deliver a similar inventory, which time the court may extend by sixty days. These requirements as to the time of delivering the inventory are intended to prevent debtors from hindering their creditors by means of an assignment held over them *in terrorem*. It will be seen, however, that the omission to deliver an inventory does not make the assignment void, but if neither debtor nor assignee deliver an inventory within the time limited the assignee may be removed.

Advertisements for claims may be made in designated newspapers once a week for six weeks, such claims to be verified and presented within thirty days of the last publication; a copy of the notice must be mailed to each creditor. The object of this advertisement is to bind creditors who do not prove their claims by the final adjudication. If all the creditors prove, the advertisement is unnecessary, but the assignee ought to advertise as a matter of precaution.

A bond in an amount directed by the judge must be filed by the assignee, within thirty days from the filing of the assignment, with the clerk of the county where the assignment is recorded. The assignee has no power to sell any of the assigned estate before giving this bond. It is, however, competent for the assignee to take possession of the assigned property before the bond is given, and it is his duty so to do in case he intends to undertake the trust.

The county judge may discharge the assignee for causes shown, and appoint another, require further security, and, in case of the death of an assignee, substitute his personal representative or successor in office in any proceeding under the act. In case of the removal of the assignee for cause, an injunction should be obtained to prevent his interfering with the assigned estate. And in case of probable delay in the appointment of a new assignee a receiver may be appointed. (1 Abb. N. C., 409.)

All moneys realized on the bond of an assignee are to be applied as assets of the assignor's estate. Section 9 permits a party in interest to prosecute the assignee's bond with leave of court. Formerly only the district attorney could take this action.

The county judge has control of the assignee and the estate though no bond be filed.

A citation for a settlement of account may be issued at any time on petition of the assignee, and, after one year from the date of the assignment or on removal of the assignee, on petition of any party. The citation may be personally served at least eight days before the return thereof in the county of the judge issuing said citation, or an adjoining county, or fifteen days before such return in any other county; or, if the creditors whose claims are

proved number more than twenty-five, service may be by mailing citation thirty days before the return day and publishing in designated newspapers once a week for four weeks. In case the person to be served or his residence cannot be ascertained, or if he cannot be found in the State, and in case of non-resident creditors, the publication must be for not less than six weeks, and the citation must be mailed to the last known address.

Minors are to have special guardians as in the proofs of wills. Any person claiming an interest may appear at the accounting. The court has power to examine witnesses, take and state an account, adjudicate the same and the claims presented, make a decree, and discharge the assignee and sureties on its performance. The court has power to compel the assignee to account (§ 20) by issuing, and personal service of, a summons to show cause why an attachment should not issue, and on the return of the summons issuing the attachment and committing the assignee to the county jail. (2 R. S., p. 85, § 18.)

It may sometimes be better, in case the assignee neglects to account, to proceed under § 6 for removal of the assignee, injunction, and receiver. The property will then be preserved, and the accounting can be enforced in like manner by attachment. Creditors who have appeared, creditors who have been cited, and creditors who have not appeared after due advertisement for claims, are barred by the discharge of the assignee.

The court may also discharge the assignee and sureties on proof of a composition between the assignor and his creditors, provided in this case that dissenting creditors have a ratable share reserved for them, which shall not be less than the share they would be entitled to were no composition made.

If composition notes be given they only suspend the claims of creditors, and if not paid the creditors may sue on the original indebtedness. (2 Abb. N. C., 379.)

For the purpose of preventing unfair preferences, provision is made by § 21 for the examination of witnesses and of the books and papers of any party or witness. The powers given by this section are very extensive.

All proceedings under the act are deemed to be had in court. Provision is made for records, the clerk being required to keep separate files and a record book, and being authorized to charge one dollar for filing all papers in each proceeding, and fifty cents for recording each decree or order. All orders and decrees have the same force and effect as if made in an original action in the county court, which is to be deemed a court of general jurisdiction. (§ 28.)

The county judge may allow the assignee to compromise claims belonging to the estate. (See Laws of 1885, ch. 464.) The court may order a trial by jury of issues arising under this act, and may grant reasonable fees and costs. The assignee or assignees are entitled to five per cent on the sum which shall have come into their hands.

Although some authorities have denied that preferential assignments could be made under this act, yet as this statute is an elaboration of the common law practice, it seems to be settled that under it preferences of certain creditors are allowable.

Such was the common law, and notwithstanding the reluctance of courts of equity to enforce it, no change in this rule has been made by the legislature. (Burrill on Assignments, (3d ed.,) pp. 35, 202; *Butler v. Thompson*, 4 Abb. N. C., 290; *Grant v. Chapman*, 38 N. Y., 293; *McClelland v. Remsen*, 36 Barb., 622.) Wages and salaries due to employees must be preferred. (Laws, 1884, ch. 328.)

A limited partnership, however, may not give preferences. (1 R. S., 766, §§ 20, 21.) So also of a moneyed corporation. (1 R. S., 591, § 9; *Curtis v. Leavitt*, 15 N. Y., 139.)

§ 1. Section 2 of chapter 466 of the laws of 1877, entitled "An act in relation to assignments of estates of debtors for the benefit of creditors" is hereby amended as follows:

§ 2. Every conveyance or assignment made by a debtor of his estate, real or personal, or both, to an assignee for the creditors of such debtor, shall be in writing, and shall specifically state therein the residence of the kind of business carried on by said debtor at the time of making the assignment, and the place at which such business shall then be conducted, and if such place be in a city, the street and number thereof, and if in a village or town, such apt designation as shall reasonably identify such debtor. Every such conveyance or assignment shall be duly acknowledged before an officer authorized to take the acknowledgment of deeds, and shall be recorded in the county clerk's office in the county where such debtor shall reside or carry on his business at the date thereof. An assignment by copartners shall be recorded in the county where the principal place of business of such copartners is situated. When real property is a part of the property assigned, and is situated in a county other than the one in which the original assignment is required to be recorded, a certified copy of such assignment shall be filed and recorded in the county where such property is situated. The assent of the assignee, subscribed and acknowledged by him, shall appear in writing, embraced in or at the end of, or indorsed upon the assignment, before the same is recorded, and, if separate from the assignment, shall be duly acknowledged.

§ 2. This act shall take effect on the first day of July, 1888. (Chapter 294, Laws of 1888.) An amendment to "General Assignment Act," (N. Y.)

§ 1. Chapter 466 of the laws of 1877, entitled "An act in relation to assignments of the estate of debtors for the benefit of creditors," as amended by chapter 328 of the laws of 1884, and also by chapter 283 of the laws of 1886, is hereby amended by adding thereto the following section:

§ 30. In all general assignments of the estates of debtors for the benefit of creditors hereafter made, any preference created therein (other than for the wages or salaries of employees under chapter 328 of the laws of 1884,

and chapter 283 of the laws of 1886,) shall not be valid except to the amount of one-third in value of the assigned estate left after deducting such wages or salaries, and the costs and expenses of executing such trust; and should said one-third of the assets of the assignor or assignors be insufficient to pay in full the preferred claims to which, under the provisions of this section, the same are applicable, then said assets shall be applied to the payment of the same *pro rata* to the amount of each said preferred claims. (Chapter 503, Laws of 1887.) Amendment to "General Assignment Act," (N. Y.)

COMPOSITION DEED.—*Creditor's Settlement*.—Whereas A. B., of does justly owe and is indebted unto us, his several creditors, in divers sums of money, but by reason of many losses, disappointments, and other damages, happened unto the said A. B., he has become unable to pay and satisfy us, our full debts and just claims and demands, and therefore we the said creditors have resolved and agreed to undergo a certain loss and to accept of twenty-five cents for every dollar owing by the said A. B. to us the several and respective creditors aforesaid, to be paid in full satisfaction and discharge of our several and respective debts.

Now, Know all men by these Presents, that we, the several creditors of the said A. B., do for ourselves severally and respectively, and for our several and respective heirs, executors and administrators, covenant, promise, compound and agree, to and with the said A. B., and between ourselves, that we will accept, receive and take of, and from the said A. B. for each and every dollar that the said A. B. does owe and is indebted unto us, the said several and respective creditors, the sum of twenty-five cents, to be paid in the manner following, that is to say, (in instalments to be secured by notes of debtor indorsed by a third person, or as the case may be, and to be delivered by a day certain.)

And we, the said creditors, do further covenant and agree, that neither we, the said several and respective creditors nor either of us, shall or will, at any time or times hereafter, (except upon default in the delivery or payment of said notes, so indorsed as aforesaid, or either or any of them), sue, arrest, molest or trouble, the said A. B., or his goods and chattels, for any debt or other thing (now due or owing to us or any of us, or for any liability now existing against the said A. B., in favor of us or either of us), provided, however, that should default be made by the said A. B. in the delivery of the said notes indorsed as aforesaid, and within the time aforesaid (or, upon default in the payment of said notes, or any or either of them), these presents shall be void and of none effect, (provided always, and it is hereby agreed and declared, that these presents shall not in anywise prejudice or affect the right of remedies of any creditor against any surety or sureties, or any person or persons other than the debtor, his heirs, executors or administrators, nor any security which any creditor may have or claim for his debt or debts.) (And it is further expressly understood and agreed,

that unless the said composition shall be accepted by all the creditors of the said A. B., on or before the expiration of _____ days from the date of these presents, these presents shall be void and of no effect.)

And all and every of the grants, covenants, agreements, and conditions, herein contained, shall extend to and bind our several executors, administrators and assigns, as well as ourselves.

In evidence whereof we, the said several creditors of the said A. B., have hereunto set our hands and seals, this _____ day of _____ 18

Assignments (NORTH CAROLINA)—INSOLVENT LAWS AND ASSIGNMENTS.—Every insolvent debtor may present a petition to the superior court, praying that his estate may be assigned for the benefit of his creditors, and that his person may thereafter be exempted from arrest or imprisonment on account of any judgment previously rendered, or of any debts previously contracted. On presenting his petition the debtor shall deliver a schedule of his creditors, their place of residence, the amount due each and how due, and whether secured or not; a full inventory of his property; and an inventory of the property claimed as exempt from sale under execution. Such inventory must be verified by oath of petitioner.

On receiving the petition the clerk of the court shall post a notice at the court-house door and at three other public places in the county for four successive weeks, requiring all creditors to show cause within thirty days after publication why the prayer of the petitioner should not be granted. The publication may be made for three weeks in a newspaper published in the county in lieu of at court-house door, etc.

If no creditor oppose the discharge the clerk shall enter an order of discharge and appoint a trustee of all the estate of such insolvent.

Any creditor may suggest fraud by answer under oath setting forth the particulars, and as many creditors as choose may make themselves parties to the issue of fraud, but the insolvent shall not be required to answer the issue of fraud in more than one case. The issue of fraud shall be entered on the trial docket of the superior court, to stand for trial as other cases. If the issue is found for debtor he shall be discharged; if against him he shall be imprisoned until he make a full and fair disclosure.

Falsely swearing to petition or inventory is punishable as perjury in other cases, and the party is forever afterwards deprived of benefits of insolvent law.

If insolvent is kept in prison and is unable to defray prison charges, the creditor at whose instance he is imprisoned must pay such charges, and sheriff can recover the same from such creditor by suit. And if creditor fail to give security for such prison charges after twenty days notice, the debtor shall be discharged.

The order of discharge shall declare that the *person* of the insolvent shall forever thereafter be exempted from arrest or imprisonment on account of any judgment or by reason of any debt due at the time of such order, or contracted for before that time, though payable afterwards. But no debt, demand, judgment, or decree against any insolvent discharged under this

chapter shall be affected or impaired by such discharge; but the same shall remain valid and effectual against all the property of such insolvent acquired after his discharge and the appointment of a trustee; and the lien of any judgment or decree upon the property of such insolvent shall not be in any manner affected by such discharge.

The trustee has the same control and power over the property of the insolvent as personal representatives have over the property of deceased persons, and is subject to the same obligations and responsibilities. He shall pay all debts of the insolvent *pro rata*. The trustee shall make returns to, and his accounts shall be audited by, the probate court of the county where proceedings were instituted. He shall take an oath to well and truly execute his trust. More than one person may be appointed trustee; and in case of death of trustee the court may appoint a successor. (Ch. 27, vol. 2.)

Debtors in this State are entitled to one thousand dollars worth of land and five hundred dollars in personal property as exempt from execution.

Preferential assignments are allowed. Accepting a dividend out of the fund when there has been an assignment for creditors does not discharge debtor from the residue of the debt.

A general assignment for benefit of creditors will not affect a levy made under an attachment prior to such assignment.

Assignments (OHIO)—INSOLVENT DEBTORS.—When any person, partnership, association, or corporation makes an assignment to a trustee of any property, money, rights, or credits, in trust for the benefit of creditors, such assignee must, within ten days after the delivery of the assignment to him, and before disposing of any property so assigned, appear before the probate judge of the county in which the assignor resided at the time of executing the assignment, cause the original assignment, or a copy thereof, to be filed in the probate court, and enter into an undertaking, payable to the State of Ohio, in such sum and with such sureties as shall be approved by the judge, conditioned for the faithful performance, by said assignee, of his duties, according to law; any such assignment will take effect only from the time of its delivery to the probate judge; and it may be delivered by the assignor to the probate judge either before or after its delivery to the assignee.

If the assignee fails to qualify, or, with the consent of the court, resigns his trust, or dies, or is removed by the court for cause, the court must appoint a trustee in his place, who must give a bond in the same manner as the assignee.

Whenever creditors, who own not less than one thousand dollars of debts against the assignor, petition the court for permission to elect a trustee, the court must fix a time for holding the meeting and cause notice to be sent to the creditors; and if creditors representing fifty per centum or more of the indebtedness are present at such meeting they may proceed to elect such trustee, a majority in value of the debts so represented being necessary to a choice; and if the court approve the choice, and the person elected appears within ten days and gives bond, the court must appoint him the trustee, and remove the preceding assignee or trustee.

Every such assignee or trustee must, within thirty days after giving bond

cause notice to be given in some newspaper of general circulation within the county, of his appointment as such assignee or trustee, and, unless for good cause shown the court shall grant a longer time, make and file in the court an inventory, verified by his oath, of all the property, etc., included in the assignment, which shall have come to his possession or knowledge, together with an appraisalment thereof, under their oath, by three suitable, disinterested persons, appointed such appraisers by the court; and must also at the same time, file a schedule of all the debts and liabilities of the assignor within his knowledge, which schedule must contain the post-office address of each of such alleged creditors, as far as the same can be given. The assignee or trustee must proceed at once to convert all the property received by him into money, under certain specified restrictions and limitations, and, in some particulars, under the order and sanction of the probate judge.

Creditors must present their claims within six months after the publication of the notice provided for as above stated, to the assignee or trustee for allowance, and the assignee or trustee must indorse his allowance or rejection thereon. If rejected, suit to enforce the claim must be brought against the assignee or trustee within thirty days. Immediately after the expiration of the six months the assignee or trustee must make a detailed statement to the court of all claims presented, specifying what have been allowed or rejected, including the post-office address of each creditor presenting his claim.

No assignment is to be construed to include or cover any property exempt from levy or sale on execution, or from being by any legal process applied to the payment of debts, unless in the assignment the exemption is expressly waived. All taxes, and wages, not exceeding three hundred dollars, due and earned within twelve months preceding the assignment, are preferred claims. (R. S., 6348, 6355.)

The probate judge has full power to examine the assignor as to all matters concerning his property and estate; also the assignee, as to all matters pertaining to the estate and administration of the trust; and to make and enforce all orders necessary for the protection of the estate and the interests of the creditors.

Dividends are payable at the expiration of eight months from the appointment and qualification of the assignee, and as often afterwards as may be deemed proper by the probate judge. Notice of such dividend must be given by advertisement in a newspaper.

The debtor can make no assignment which will, under the State laws, thereby release him or entitle him to a discharge from his liabilities; nor will proving claim or accepting dividend by creditor operate of itself as a discharge of the debtor, but such dividend will be payment on account. Preferences in a general assignment are not allowed. But a creditor may be preferred before a general assignment has been made. (R. S., §§ 6335, *et seq.*) A *bona fide* attachment issued and levied prior to an assignment will not be affected by a subsequent assignment of the debtor under the assignment laws of this State.

Assignments (OREGON).—No general assignment of property made by an insolvent, or in contemplation of insolvency, shall be valid unless made for the benefit of all his creditors in proportion to the amounts of their respective claims. The assignment has the effect of discharging any and all attachments on which judgments shall not have been taken at the date of the assignment, and after payment of the costs and disbursements thereof (including attorney's fees allowed by law in case of judgment), the claim or claims shall be deemed as presented and shall share *pro rata* with other claims.

In case of an assignment for the benefit of all the creditors of the assignor the assent of the creditors shall be presumed. The debtor shall annex to the assignment an inventory under oath of his estate, real and personal, and also a list of his creditors and the amounts of their respective demands. Every assignment shall be in writing, and acknowledged in the same manner as conveyances of real estate, and recorded in the county where the assignor resides or the business was carried on. Within thirty days after the filing of the assignment any two creditors may petition the court to order the clerk to call a meeting of creditors for the purpose of electing an assignee in place of the assignee named in the assignment, and the clerk shall thereupon call such meeting to take place at his office not more than fifteen days from the date of such call. The assignee to be then elected must be a resident of the same county as the assignor. At the meeting the creditors may appear in person or by proxy, and a majority in number and value shall elect; and if no one receives a majority of at least one-half in amount of all claims represented at the meeting, then the matter shall be certified by the clerk to the judge, who shall select an assignee. The assignee named in the assignment shall thereupon convey property to the assignee elected or appointed; and the new assignee shall give bond required of the former assignee, and shall possess the same powers. From the time the petition for election of an assignee is filed until an assignee is elected or appointed, the property of the debtor, except perishable property, cannot be disposed of by assignee or any one. A creditor in order to be entitled to vote must file a verified statement of his claim with the clerk. The assignee shall forthwith file with the clerk of the circuit court where the assignment shall be recorded a true and full inventory and valuation of such estate, under oath, as far as the same has come to his knowledge, and shall then and there enter into bonds to the State of Oregon, for the use of the creditors, in double the amount of the valuation of estate, with two or more sureties to be approved by the clerk, and the assignee shall thereupon proceed to perform any duties necessary to effectuate the assignment. The assignee shall forthwith forward a notice of the assignment to each of the creditors, who must thereupon forward to the assignee, within three months after the date of such notice, a full statement of their claims against the assignor, otherwise their claims will not be allowed until those presented within the prescribed time shall be fully settled and paid.

When it shall appear to the satisfaction of the court, where the matter is pending upon the final report of the assignee, that the debtor has been

guilty of no fraud in making the assignment, nor of any concealment or division of his property, but has acted fairly and justly in all respects; and that his estate has realized at least fifty per cent of all his debts, over and above all expenses, the court shall, upon the allowance of the final account, make an order discharging the debtor from debts existing at the time of the assignment.

The proving of a claim against the estate of an insolvent assignor and the accepting of a dividend by the creditor does not discharge the debtor, and the dividend secured is only a payment *pro tanto*.

Assignments (PENNSYLVANIA).—Any debtor may make an assignment of a part or all of his property in trust for the benefit of creditors, either with or without their consent. Corporations for public internal improvement are excepted while indebted to contractors, laborers, and workmen.

The assignment must be in writing, acknowledged like a deed, and recorded in the office of the recorder of deeds in the county where the assignor resides, within thirty days after execution, or else it is void against attaching creditors. (Act of March 24th, 1818.) The debtor names the assignee in the instrument, in whom the assigned estate vests forthwith upon the delivery of the instrument. The assigned property should be actually transferred to the assignee. Assignments by non-residents must be recorded where the property is. The recording is constructive notice to creditors. The instrument itself is not filed. A partial assignment is within the meaning of the act requiring the instrument to be recorded. The debtor may reserve the three hundred dollars worth of property exempted by law from levy and sale upon execution.

The assignee must file an inventory in the court of Common Pleas within thirty days, with affidavit that it is full and complete; he must give bond with two or more sufficient sureties in double the appraised value of the real and personal estate, and file an account within one year. He may be discharged for mismanagement, neglect, failure to file an inventory or give bond, in which case the court appoints a successor. He may be cited to account after one year.

The assigned estate is distributed *pro rata* among all creditors, except miners, mechanics, and laborers, who are paid first, provided that no one claim shall exceed two hundred dollars. A levy made under an execution or an attachment served prior to an assignment is unaffected by it. Liens upon real estate, also, which are prior to the assignment, are unaffected. The court, however, may order the sale of land, clear of all incumbrances except first mortgages, where the personal estate is insufficient to pay the debts and the land is heavily incumbered. Notice of such sale must be given to each creditor. (Act of February 17th, 1876.) When a purchaser of real estate at an assignee's sale is entitled as lien creditor to receive the whole or a portion of the proceeds of sale, his receipt may be given to the assignee for the amount of his claim. A sum sufficient to cover costs, however, may be demanded by the assignee. (Act of June 10th, 1881.)

A lien or secured creditor is entitled to a dividend on his entire claim, and may proceed on his lien or security to collect any unpaid balance. Judgment creditors have no preference unless secured by such prior liens upon real estate. No provision is made for a release of the debtor, who remains personally liable after assignment for any unpaid balance.

Preferences, conditions, and stipulations for a release in assignments in trust for creditors are declared void by statute. (Act of April 16th, 1849; *Purd. Dig.*, 91.) A debtor, however, may prefer a creditor by confession of judgment, or assignment of specific property *directly to him*, either as security or payment. Such preference is not an assignment in trust, and will be upheld unless there is a specific intent to hinder or delay other creditors. The effect may be to pay some and to hinder or delay other creditors, but this alone will not invalidate the preference.

The account of an assignee or trustee is filed in the court of Common Pleas and referred to an auditor, before whom all claims are presented and proved at any time before final distribution is made up. The debtor may be examined if necessary. Rejection of claims and failure to prove them cuts off the creditor from the fund in the hands of the assignee. Any one dissatisfied with the schedule of distribution reported by the auditor may file exceptions, which are argued in court. Distribution is made after the report is confirmed. Partial or final accounts may be filed and dividends declared from time to time according to the circumstances of the case. A wife's dower in real estate is not barred unless she joins in the assignment with proper acknowledgment.

Fraudulent assignments to secrete property or evade creditors are punished by fine and imprisonment.

Assignments (RHODE ISLAND)—INSOLVENT LAW.—The following are some of the more important provisions of the insolvent law: 1st. A debtor residing in this State whose property is attached by a creditor may suspend the attachment by making and recording an assignment of all his property not exempt from attachment, for the equal benefit of all his creditors, with a right to prefer debts due the United States and the State of Rhode Island and "wages of labor performed within six months," not exceeding one hundred dollars to any one person. 2d. If any insolvent debtor makes a conveyance by which one creditor obtains a preference over others, "one or more of his creditors holding not less than one-fifth of the debts in amount of such debtor" may proceed by petition to the supreme court, which, on proof of insolvency, and a preference given, or about to be given, will appoint a receiver, dissolve attachments, set aside preferences, and direct the equal distribution of the debtor's property among the creditors who come in and prove their claims pursuant to notice ordered by the court. 3d. All mortgages and other conveyances giving preferences will be declared void if the proceedings before the supreme court be commenced within sixty days after such conveyance be recorded. (*Pub. Stats.*, ch. 237.) The debtor does not obtain a discharge under any proceedings in insolvency except by voluntary act of the creditors.

Assignments (SOUTH CAROLINA)—For the benefit of creditors are of two kinds: 1st, a voluntary assignment; 2d, assignment under process.

1st. When a debtor in embarrassed circumstances shall assign his property for the benefit of his creditors, the creditors can, if they desire, name an agent or agents equal in number to that of the assignees, to act with them. To effect this it is the duty of the assignees to call the creditors together within ten days from the date of the assignment. If the assignee neglect or refuse to call such meeting, the creditors can meet and name an agent, and the estate of the assignee will be forfeited. No sales or transfers of the assignee before such meeting are valid. If the creditors neglect or refuse to appoint an agent, the assignees can act alone. The assignees report to the creditors every three months. Their compensation is five per cent for receiving and two and a half per cent for paying out money. By a A. A. 1882, (17 Statutes at Large, 847,) the law with regard to assignments was materially changed. Any assignment is void in which any provision or disposition of the property assigned is made or directed other than that the same be distributed among all the creditors of the insolvent debtor equally in proportion to their demands, and without any preference or priority of any kind except as to debts due to the public, and except as to such creditors as may accept the assignment and execute a release to the debtor. All transactions affecting the estates of insolvent debtors taking place within ninety days prior to the assignment are void, except liens given at the time for money *bona fide* advanced. Any creditor, whether his demand be put in judgment or not, may attack an assignment. (A. A. 1881-82.)

2d. A debtor under confinement or arrest can, by surrendering all his estate, obtain his discharge from arrest. The debt due to a creditor is not affected by any of these proceedings, if he does not participate in the dividends.

INSOLVENT LAWS.—An insolvent under arrest in any civil action may be released from arrest under these circumstances: He must file a petition to this effect to the court of Common Pleas of the county in which he is confined, containing a full statement of his estate, real and personal, particularly set forth, and also stating the cause of his imprisonment. Upon hearing the petition the court will order the prisoner to be brought before it, and all of his creditors to be summoned by public notice in some newspaper of the county, or, if there be none, in some newspaper circulated in the county, said notice to be published for three months, to appear at some day certain after the expiration of said three months, to show cause, if any, against the discharge of such prisoner. On the day so fixed an examination is made into the truth of the facts of the petition, and the petitioner is examined on oath touching the matters therein contained, and of the disposition he has made of his property, and an oath provided in the statutes is administered to him.

If the court be satisfied, the debtor is allowed, from the articles in his petition stated, his necessary bedding, wearing apparel, working tools, and arms for muster; and, if he be the head of a family, his homestead and the other property is assigned by him to the suing creditors or to such person as the court may order. Thereupon, and upon the delivery of the property set

forth in the petition, the debtor is discharged from arrest and is also released from the claims of all creditors who accept a dividend out of the estate assigned by him. (Rev. Stat., title vi., ch. cxiii.)

There is no provision of law whereby a creditor can be compelled to accept a part of the estate of an insolvent debtor in full of his debt. A debtor may make a voluntary assignment of all of his estate for the benefit of such of his creditors as may choose to accept it, on the terms presented. Or a debtor under arrest, in the exceptional cases allowed by the Code, may, if he desire it, obtain his release from arrest by a surrender of his effects. But only those creditors who voluntarily come in and share in the dividends are affected by these proceedings. But no system has been devised, and the proceedings are as simple as possible.

The debtor is the actor. He files his petition for release, and accompanies it with his schedule. Thirty days are given to the creditors to come in and resist the application for the discharge if they choose. On the day fixed the court hears the case in a summary way, and if it favors the application, reserves certain property for the debtor and appoints the creditor plaintiff or some other person assignee, who takes the remainder of the property and the debtor gets the qualified release.

The penalties of perjury follow a false schedule; the debtor is subject to re-arrest, and is forever deprived of the benefits of the act. If fraud in the schedule be charged, the judge or justice shall order an issue to be made up and tried before a jury.

Assignments (TENNESSEE).—INSOLVENT LAWS AND ASSIGNMENTS FOR BENEFIT OF CREDITORS.—An insolvent debtor may convey his real or personal property to an assignee (often called a trustee) for the purpose of paying his debts; but no preferences are allowed since the Act of April 2d, 1881. The insertion in the conveyance of a clause for preferences does not invalidate the assignment, but only renders nugatory that particular clause. All conveyances of the debtor's property, or any portion thereof, to prefer or secure particular creditors, made within three months preceding a general assignment, and in contemplation thereof, are void, and property so conveyed will be shared ratably by all creditors as if it was embraced in the general assignment. All confessions of judgment, within three months preceding a general assignment, and in contemplation thereof, are void. The debtor is required to file a schedule, under oath, of all his assets. This act does not prohibit the execution of a mortgage, or deed of trust, as security for the loan of money, or sale of property, made contemporaneously. An assignment for the benefit of creditors will not affect a prior levy under attachment or execution. There can be no involuntary proceedings against insolvent debtors for the benefit of creditors. Acceptance of the benefits of the conveyance by creditors is presumed, in case of adverse proceedings, by execution or attachment against the property conveyed. If the assignee fails to execute the terms of the deed properly, any creditor may file his petition in the county or chancery court, have the assignee removed, and another appointed in his stead, or have the terms of the assignment executed under the orders of the court.

Every assignee to whom property exceeding the value of five hundred dollars is conveyed in trust for the benefit of creditors, unless released by them in writing, shall give bond in the value of the property for the faithful performance of his duties; and shall take an oath before the county court clerk: 1. That he will faithfully perform the duties of his office; 2. Make a perfect schedule of assets assigned; and 3. Make a complete report of his sales.

Actual notice must be given to the debtor in case of assignment of chose in action.

Failure to give bond does not invalidate the assignment, but subjects the assignee to removal. The court may allow the assignee reasonable compensation, in no case to exceed five per cent.

Assignments (TEXAS).—Assignments for the benefit of creditors, made by any debtor, insolvent, or in contemplation of insolvency, must provide for the distribution of all the estate, real and personal, of such debtor, except such as is exempt by law from execution, among his creditors, in proportion to their respective claims; and shall be so construed and enforced, however expressed. The assignment should be authenticated for record in the same manner as conveyances of real estate or other property. The law requires that the assignment have annexed an inventory of all the creditors of the assignor, giving places of residence, if known, the amount and nature of their respective claims, the consideration of each, and the place where debt arose, a statement of any judgment or other lien securing any debt, a full inventory of the debtor's estate, real and personal, in law or in equity, at date of assignment, and the liens thereon, and all vouchers and securities relating thereto, and the value of such estate; which inventory shall be sworn to. The benefits of the assignment may be limited to such creditors as will accept the same in full discharge of the debtor, but such discharge shall not take effect as to creditors who receive less than one-third of their debts. The assignee is required, within thirty days from the date of the assignment, to give public notice of his appointment in a newspaper of the county where the assignor resides or does his principal business, or in the nearest newspaper, for three weeks; and also in person or by mail to each creditor, where he can do so. Each creditor consenting to the terms of the assignment must in writing make known to the assignee his consent within four months after the publication above provided for, and no creditor failing so to do will be permitted to receive the benefits of the assignment; provided, however, that any creditor who had no actual notice of the assignment, and shall give in his consent before distribution, is entitled to receive his share. The receipt of any portion of his claim from the assignee by any creditor is made conclusive evidence of the assent of such creditor.

The assignee is required to place the assignment on record forthwith, and shall, before taking possession of the estate, execute a bond with sureties, to be approved by the judge of the district or county court, conditioned for the faithful discharge of his duties under the assignment; which bond may be sued on by the assignor or any creditor or creditors, severally or jointly, for any damage arising from its breach. Creditors assenting to the assignment

must, within six months from the time of publication first made of appointment of assignee, file with the assignee a distinct statement of the nature and amount of their claims against the debtor, which must be supported by the oath of the creditor, his agent or attorney, that the statement is true, that the debt is just, and that there are no credits or offsets that should be allowed against the claim, except as shown by the statement. Such statement *prima facie* justifies the assignee in allowing it as a valid claim, and it must be so allowed and paid, unless the assignor, or some creditor disputing it shall, within sixty days after the expiration of the six months within which claims are to be filed, institute an action in the district or county court of the proper county to set aside the allowance and restrain payment on such claim; for which a remedy is provided, by injunction or otherwise, to try the justness and validity of such disputed claim. If it appears that an action at law could not be maintained on such claim by the creditor against the assignor, the allowance will be set aside, in whole or in part, as the case may be. The assignee shall allow copies taken of any creditor's statement for the purpose of investigation if desired.

Claims not due may be allowed at present value on the basis of the stipulated or legal interest, as the case may be.

Any claim for which the owner holds part security may be allowed for unsecured balance, after deducting the value of the security as estimated by the assignee.

Any creditor not consenting to the assignment may garnish the assignee for any excess of the estate after payment of expenses and the debts of consenting creditors.

Property transferred by the assignor previous to and in contemplation of such assignment, with intent to defeat, delay, or defraud creditors, or give preference to one creditor over another, passes to the assignee by such assignment, or may be recovered in his name by any creditor and brought into the estate for distribution. But if in any action for such property it appear that the purchaser bought in good faith for a valuable consideration, without any reason to believe that the debtor was transferring the same with the intent above stated, such purchaser shall hold as against the assignee and creditors.

No assignment is void for want of an inventory annexed; but the absence of such inventory is made *prima facie* evidence of the withholding of a part of his estate from the assignee by the debtor, unless, upon request, he supply the defect; and any assignee or creditor upon application may compel the debtor to disclose under oath, before the district or county judge, either in term time or vacation, any information he has as to any concealment of estate. It is made felony in any assignor to conceal from his assignee any of his estate other than such as is exempt by law from execution; or to transfer any of his property previous to or in contemplation of an assignment, with the intent to defraud his creditors.

Whenever the assignee has sufficient funds of the estate on hand to pay ten per cent of the debts due by the assignor, he is required to make distribution among the creditors entitled.

The assignee is entitled to reasonable compensation for services, necessary costs, expenses, and attorneys' fees,—to be fixed, in case of dispute, by the judge of the county or district court.

On a final report of the assignee showing under oath the assets that have come into his hands and how he has disbursed the same, such report is placed on record in the office of the county clerk, and no action can be brought against the assignee by reason of any thing shown by such report, unless brought within twelve months from the time of the filing thereof. Any funds remaining in the hands of the assignee at the time of making final report are required to be deposited in the district court, subject to its decree.

Assignments (UTAH).—There is no statute law regulating the making and the administration of assignments in insolvency. But such assignments may be made, and will be administered as at common law; hence preferential assignments are allowed. Proving claim in insolvency or in general assignment proceedings and accepting dividend will not operate as a discharge of the debtor. The amount of the dividend is applied on the account merely.

Assignments (VERMONT).—**INSOLVENT LAWS AND ASSIGNMENTS.**—An insolvent law was passed in 1876, which in general terms resembles the United States bankrupt law. It of course has no extra-territorial effect, so as to bar the claim of a non-resident of Vermont who does not prove his claim. It provides for both voluntary and compulsory insolvency, and grants discharges. To compel non-resident creditors to come in and prove their debts, and so come within the scope of the law, it contains a provision that the debtor's property in this State, acquired subsequently to the adjudication of insolvency against him, shall not be subject to attachment by trustee process or otherwise in any suit to recover a debt which may have been provable in the insolvent court, and due to any person not resident in this State at the time of such adjudication, or founded on any contract existing at the time of such adjudication, and made or to be performed out of the limits of this State. It contains no provision for composition.

The probate courts of the several counties are constituted courts of insolvency.

The following are some of the provisions of this insolvent law.

The petition is to be made by the debtor in voluntary cases; in involuntary cases by one or more creditors holding provable claims to the amount of two hundred and fifty dollars. It must be sworn to, and be filed with the judge of the probate court for the district where the insolvent resides.

In voluntary cases the petition must be accompanied with a schedule of petitioner's property, and a statement of the liens thereon, and also a schedule of his creditors, with the post-office address of each, and the sum due each as near as he can state. The creditors, at a meeting called by the judge, elect an assignee. A majority in number and amount is requisite. If no choice is made by the creditors the judge appoints the assignee. He must give bonds in such amount and with such sureties as the judge shall require or approve.

Notice to creditors to prove claims and elect assignee is given by mail to all the known creditors, and also by publication in one or more newspapers. Claims may be proved before a judge of any court, justice of the peace, notary public, or master in chancery. Appeals from the decision of the judge of probate on any claim may be taken to the county court for the county in which the insolvency proceedings are pending. Preferences within four months before the filing of the petition by or against the insolvent are set aside.

All attachments made within sixty days next preceding the filing of the petition are dissolved by the adjudication of insolvency; also all levies of execution where the property levied upon has not actually been sold before the commencement of the proceedings in insolvency, and was not actually attached upon mesne process at least sixty days before such commencement of proceedings. The same exemptions are allowed an insolvent which are allowed to an ordinary debtor in respect to attachments. The following claims are preferred, and in this order: 1. All debts due the United States, and all taxes and assessments made under the laws thereof. 2. All debts due the State, and all taxes and assessments made under the laws of the State. 3. Wages due any employee, clerk, or house-servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the date of the adjudication of insolvency. So far as regards debts due to residents of Vermont, or claims due to other persons who prove their claims, the discharge granted by the court is final and conclusive. Discharges are not granted where assets do not amount to thirty per cent of debts proven, except a majority in number and amount of the creditors assent thereto.

The debtor must submit to an examination if applied for. The punishment for fraud on the part of the debtor after commencement of proceedings in insolvency is by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison not exceeding five years.

The grounds for an adjudication of involuntary insolvency upon creditor's petition are: If the debtor residing in this State and owing debts exceeding three hundred dollars shall depart from the State with intent to defraud his creditors; or being absent shall with such intent remain absent; or shall conceal himself to avoid the service of legal process or any action for the recovery of a debt or demand provable under the insolvent act; or shall conceal or remove any of his property to avoid its being attached, taken, or sequestered on legal process; or shall make any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits, either within this State or elsewhere, with intent to defraud or hinder his creditors; or who has been arrested and held in custody under or by virtue of mesne process or execution issued out of any court of any State within which such debtor has property, founded upon a demand in its nature provable against an insolvent debtor's estate under the insolvent act, and for a sum exceeding one hundred dollars, and such process is remaining in force and not discharged by payment or in any other manner provided by the laws of the State appli-

cable thereto, for a period of twenty days; or if the debtor, his goods or estate having been attached on mesne or trustee process, on any cause of action founded on contract for the sum of one hundred dollars or upwards, has not before the return day of said process dissolved the same by payment, replevin, or otherwise, or given security therefor; or if, his goods, chattels, or estate having been levied upon and taken by virtue of any execution issued in any civil action founded on contract to an amount exceeding one hundred dollars, he has not within seven days after said levy shall actually be made dissolved the same by payment or otherwise; or, being insolvent, or in contemplation of insolvency, shall make any payment, gift, grant, sale, or conveyance of money or other property, estate, rights, or credits, or confess judgment, or procure his property to be taken on legal process with intent to give preference to one or more of his creditors, or to any person or persons who are or may be liable for him as indorsers, bail, sureties, or otherwise; or with intent by such disposition of his property to defeat or delay the operations of the insolvent act; or, being a banker, broker, merchant, trader, manufacturer, or miner, has fraudulently stopped payment; or, being a banker, broker, merchant, trader, manufacturer, or miner, has stopped or suspended payment within a period of forty days, of his commercial paper (made or passed in the course of his business as such), such debtor shall be deemed to have committed an act of insolvency, and may be adjudged an insolvent debtor upon the petition of any of his creditors whose claims provable against his estate amount to the sum of two hundred and fifty dollars, filed within ninety days after such act of insolvency.

Appeals from certain decisions in the court of insolvency lie to the county court, in most of which cases the judgment of the county court is conclusive both as to law and fact. Upon the question of the discharge of the debtor, an appeal from the court of insolvency lies to the court of chancery.

Assignments for the benefit of creditors may be made, which must be in writing and signed by the debtor; if of real estate, they shall be by deed, executed and recorded conformably to the laws relating to the conveyance of real estate. All such assignments are for the benefit of all the creditors of the assignors in proportion to their respective claims.

Every assignment must be specific and be accompanied with a full inventory of the property assigned, including choses in action; and also with a list of creditors to be benefited by the assignment, and the sums due each one as near as may be. At the time of making the assignment a copy thereof must be filed and left in the county clerk's office in the county where the assignment is made and the property assigned is situated.

The assignee must not be a creditor nor interested in the provisions of the assignment, and he must at the time of making the assignment execute to the probate court for the district in which he resides a satisfactory bond, with sureties, for the faithful performance of his trust. He must proceed with all reasonable dispatch to the completion of the trust, and, when completed, he is required to file with the county clerk a full copy of the settlement of his trust account verified by his oath. If he neglects unreasonably to close up his trust, the chancellor has power to order him to do so, and to

enforce such orders by proceedings as for a contempt. Under this kind of voluntary assignment the debtor obtains from the law no discharge of his debts, and prior attachments or levies are not affected thereby.

Assignments (VIRGINIA).—INSOLVENT LAWS.—There are no insolvent laws, strictly so called, in Virginia. An insolvent may voluntarily assign his estate to a trustee for the benefit of his creditors, and may prefer certain creditors to others. An insolvent will not be released if his creditors do not assent to it, although he should make an assignment of all his property.

Assignments (WASHINGTON TY.).—INSOLVENT LAWS OR ASSIGNMENTS.—The insolvent may petition the district court, stating the circumstances which compelled him to surrender his property to his creditors, concluding with a prayer to make cession of his estate and to be discharged from his debts. He must annex to the petition a verified schedule giving the names of his creditors, if known, the amount due each, the cause and nature of each debt and when it accrued, and a statement of any existing judgment, mortgage, collateral, or other security, and also a list of losses he may have sustained. Also a complete inventory of all his property and choses in action and moneys. On receiving the petition and schedule the judge must make an order that the creditors appear and show cause why an assignment of the insolvent's estate be not made and he be discharged from his debts. On or before the day appointed for the meeting of creditors the insolvent must surrender to the court all the commercial or other books he may have kept, also all his vouchers, notes, bills, securities, and other evidences of debt belonging to him. Notice of the meeting of creditors must be given by publication for at least thirty days. When issuing an order for the meeting of creditors the judge must order all proceedings against the debtor to be stayed, and may, upon application of a creditor, appoint a receiver to take possession of all the property of the debtor. At the meeting of the creditors they must verify their claims and elect one or more assignees, not exceeding three. A majority of the creditors in sums or claims elects. Assignees must give bonds with sureties in an amount to be fixed by the creditors or the court. If the creditors do not select an assignee the court appoints the sheriff of the county, or one of the creditors, to act as assignee. Within ten days after the appointment of the assignee any creditor may make an accusation of fraud against the insolvent. If the accusation upon trial thereof is found to be well founded, the debtor is debarred from all benefit of the act. Every debtor is guilty of fraud who conceals his property with intention to keep it from his creditors, or conceals or alters his books with the same intention, or passes sham deeds, or intentionally omits any of his property from his schedule, or of having fraudulently alienated, mortgaged, or pledged any of his property, or commits any other fraud to the prejudice of his creditors, or of having within three months preceding his failure confessed judgment in order to give a preference in favor of a creditor over others. The judge must appoint an attorney to represent non-resident creditors. The judge must set aside for the use of the insolvent all real and personal property exempt from execution. There is no time specified for presenting claims or

declaring dividends. Foreign are on the same footing as domestic creditors. If not convicted of fraud the debtor is discharged from all his debts.

All legal mortgages and liens *bona fide* existing on the property of the insolvent at the time of the surrender shall remain good and valid, and be enforced in the same manner as though no such surrender had been made. (R. C., §§ 2014-2052.)

Assignments (WEST VIRGINIA) FOR THE BENEFIT OF CREDITORS—Are made by deed, acknowledged as other deeds, and filed in the office of the clerk of the county court of the county wherein the property assigned is situated. If real estate is included in the assignment the wife of the assignor must sign, seal, and acknowledge the deed of assignment to bar her dower. No inventory is required by law to be filed except that when sale of property is made under the deed of assignment there shall, within six months after the sale, be returned by the trustee to the clerk of the county court of the county wherein said deed has been first recorded, an inventory of the property sold, and an account of sales, on pain of forfeiture of the assignee's commissions on such sales. Such commissions are generally five per centum on amount of money received under the trust. The deed of assignment usually states the percentage of commissions, and five per centum is ordinarily directed to be allowed. Such inventory is not required to be under oath.

The assignee is any person chosen by the debtor, who has such assignee's name inserted in the deed of assignment. No bond is required to be given by the assignee.

No notice is required by law to be given to prove claims. The assignee must distribute the property assigned, or the proceeds thereof, as provided in the deed. If the deed is for the benefit of all creditors, the assignee must distribute to all *pro rata*, or with preference according to the deed, whether they prove or not; but it is customary to file a sworn claim. If the assignee should reject a claim, a suit in chancery against him for the proper dividend would be the remedy. Preferences are allowed. No exemption is made from the assigned property, but generally the legal exemption, as elsewhere herein stated, is expressly reserved in the deed.

The assignee has a reasonable time—no specific time—to declare dividends and close the estate. If a creditor is dissatisfied he must sue in chancery the trustee for breach of his trust, and to expedite the execution thereof. The assignment does not generally give debtor a final discharge. The dividend is applied on his indebtedness, leaving the residue thereof as a claim against him. But the debtor may make a deed of composition assigning all his property for the benefit of those only who will release him on payment of the dividend. In such cases all creditors, foreign and resident, who do not consent to release, receive no dividend, and their claims are not affected, but they receive no dividend. Debtor is not required to submit to examination, and there is no special punishment for fraud in an assignment. If crime is committed in perpetrating the fraud, it is punishable according to the grade of crime. A general assignment for the benefit of creditors will not affect a levy made under a valid attachment prior to such assignment.

Assignments (WISCONSIN).—Voluntary. The circuit court has supervision over voluntary assignments, and may make all necessary orders for the execution of the same. No form of voluntary assignment is prescribed by law. Preferences in assignments render the assignment void, unless such preferences be for the wages of laborers, servants, and employees, earned within six months, and employees are preferred by law for three months' wages. All assignments or transfers for the benefit of creditors are void as against creditors unless the assignee is a resident of the State, and shall, before taking possession of the property assigned, deliver to the county judge, or court commissioner of the county in which such assignor resides, a bond executed to the clerk of the circuit court, by his name of office, as obligee, in a sum not less than the whole amount of the nominal value of the assets of such assignor, which value shall be ascertained by the oath of the assignor and of at least one witness, with two or more sufficient sureties, freeholders of the State, who shall satisfy the officer taking such bond, by their several affidavits, that the property of such sureties within the State is worth in the aggregate the sum specified in the bond. The officer taking the bond must not be a creditor of the assignor. The bond must be conditioned that the assignee will faithfully discharge the several trusts reposed in him by the assignment, and diligently and faithfully collect and reduce to money the property assigned, and shall account for, and pay over to the creditors all moneys that shall come into his hands after deducting the necessary expenses as settled and allowed by the circuit court, and abide the order of the court. The bond of the assignee and a copy of the assignment must immediately be filed in the office of the clerk of the circuit court. Before delivering a copy of the assignment to the officer to be filed, the assignee must, in the presence of the officer taking the bond, indorse in writing on the copy to be filed his consent to take upon himself the faithful discharge of the several trusts specified in the assignment, and that the copy so indorsed is a true and correct copy of the original. Within the ten days after the execution of the assignment the assignor must file with the clerk of the court a correct inventory of his assets and list of his creditors, stating the place of residence of each creditor and the amount due each, which must be verified by the assignor and certified to by the assignee as being correct, to his best knowledge and belief; but no mistake therein shall invalidate such assignment or affect creditors' rights. The assignee within twelve days after the execution of the assignment must notify the creditors thereof by mailing a copy of a notice to each creditor, and publishing the notice for three successive weeks in a newspaper in the county, or, if none, in an adjoining county. The notice must contain a notice of making the assignment and of the post-office address of the assignee, and that every creditor is required to file within three months, with such assignee or the clerk of the court, naming him and his post-office address, on pain of being debarred a dividend, an affidavit setting forth his name, residence, and post-office address, the nature, consideration, and amount of his debt over and above all offsets. Three months after the first publication of such notice the assignee must file with the clerk of the court proof of the publication and a verified list of cred-

itors to whom such notice was mailed, with the dates thereof, and also a list of the creditors from whom affidavits of claims have been received by himself and the clerk of the court. At any time within thirty days after the list is filed the assignee or any creditor may file a written objection, specifying the grounds thereof, to the whole or any part of any claim of any creditor, and must serve a copy thereof upon such creditor. The judge will then fix, by order, the time when such objections will be heard, and may, in his discretion, award a trial by jury. Upon the hearing the court or judge makes such order as shall be just in the premises. Depositions may be taken as in actions, and appeals may be taken from such order to the supreme court, within thirty days from the entry of the same. Creditors who neglect to prove their claims shall not participate in any dividends made before their claims are filed. Debts to become due are also to be proved, but a rebate of interest is computed, when demandable upon them, to the time of dividend. The assignee may pay or the court may order a dividend to be paid at any time, making provision for the protection of claims in dispute; but before making any dividend the assignee must pay all taxes assessed upon the assigned property. Within six months after the assignment, or within such further time as the judge shall allow, the assignee must file a report setting forth a statement of the property by him received, the manner of his dealing therewith, the amount realized, the names and residences of the creditors of the assignor, the dividends paid them, and a full account of his receipts and disbursements, with a statement of what he claims for compensation. If he neglects to file such report, or to apply promptly for settlement of such account, the court may compel the account or settlement by order. Upon filing the report, the assignee may apply to the court for a final settlement of the account, but a notice thereof of not less than twenty days must be given by mail to the creditors. The court on such application will hear any objections by any creditor, taking evidence, if necessary, and settle and adjust such accounts; but any party aggrieved may appeal from such order within six months from the entry thereof. The circuit judge may remove any assignee for incompetency, or who has become disqualified, or wasted or misapplied any of the trust estate, and appoint another in his place. Every execution levy made under a judgment confessed against an insolvent debtor within sixty days prior to an assignment for the benefit of the creditor, or under a judgment entered on a judgment note, by such debtor, within sixty days prior to such assignment, and the lien of such judgment upon real estate shall be void and of no effect.

Every sale, mortgage, hypothecation, lien, or other security of any name or nature, made, given, or executed by an insolvent debtor within sixty days prior to the making of an assignment, and in contemplation thereof, or of insolvency, shall be void and of no effect, provided the vendee of such sale or the person benefited thereby or receiving such mortgage, hypothecation, lien, or security, knew, or had reasonable cause to believe, such debtor insolvent. The assignee, or upon his refusal any creditor who has filed his claim, may avoid by action any levy, sale, mortgage, hypothecation, lien, or other security named. The assignee is considered as representing the rights and

interests of the creditors of the debtor as against all transfers and conveyances of property which would be held to be fraudulent or void as to creditors. The assignee or any creditor may, upon application to a judge, secure an order for the inspection of the books of the assignor, have the examination upon oath of the assignor and other witnesses as to business affairs and condition of the assignor, and as to all matters pertaining to the assigned property, and as to the indebtedness to the assignor. The creditor causing such examination to be had must pay the expenses thereof, unless the judge before whom the same is taken is satisfied that such examination was instituted for the benefit of the creditors at large.

Involuntary. There is no provision of law by which an insolvent debtor can be compelled to make an assignment for the benefit of his creditors, so that he can make such disposition of his property as he may think proper, and the same will be valid unless the debtor voluntarily makes assignment for the benefit of his creditors.

INSOLVENCY.—An insolvent debtor may be discharged from his debts in the following manner: He must present to the circuit court of the county in which he resides, or the presiding judge thereof, a petition praying to be discharged, and must annex to and deliver with his petition a schedule containing: 1. A full and true account of all his creditors; 2. Place of residence of each creditor, if known; 3. The sum owing to each creditor, the nature of each demand, whether on written security, on account, or otherwise; 4. The true cause and consideration of such indebtedness, and where accrued; 5. A statement of any existing mortgage, collateral or other security for payment of such debt, and a full and true inventory of all his estate, both real and personal; and all choses in action, debts due, and moneys on hand; of the incumbrances existing thereon, and all the books, vouchers, and securities relating thereto. An affidavit must be attached to such petition, to the effect that the account of his creditors and the inventory of his estate are in all respects just and true, and that he has not at any time or in any manner whatsoever disposed of or made over any part of his estate for the future benefit of himself or his family, or in order to defraud any of his creditors; and that he has in no instance created or acknowledged a debt for a greater sum than he honestly or truly owed; and that he has not paid or secured to be paid, or in way compounded with his creditors with the view fraudulently to obtain his discharge. Upon the filing of such petition, schedule, and affidavit, the court or judge must make an order requiring all creditors of such insolvent to show cause, if any they have, why an assignment of the insolvent's estate should not be made and he be discharged from his debts, and appointing a day for the hearing thereof, and that notice of its contents be published in a newspaper published at the seat of government in the State, and in a newspaper published in the county; and also serve personally or by mail, at least twenty days before the date of such hearing, a copy of such order on each creditor named, or included in the petition, if such creditor's residence or post-office address be known; and if one-fourth part in amount of the debts owing by such insolvent shall have accrued in any other State or Territory, or be due to creditors residing there, such order

shall designate a newspaper at the seat of government of such State or Territory in which such notice shall be published. The notice must be published once a week for ten successive weeks, unless all creditors reside within the State, when the notice need only be published for six successive weeks. At the time fixed in such order the court or judge shall hear the proof and allegations of the parties. Creditors may oppose the discharge of an insolvent debtor at the hearing, and demand a trial by jury, and shall be entitled to trial by jury upon filing a specification in writing of the grounds of their objection to his discharge. If the jury find for the insolvent, or if it satisfactorily appear to the court or judge in cases where no jury has been required, or the jury have disagreed, that the insolvent is justly and truly indebted to the creditors in the sums mentioned in his schedule and affidavit, that such insolvent has honestly and fairly given a true account of his estate, and has in all things conformed to the matters required of him by the laws in reference to insolvents, the court or judge shall direct an assignment of all such insolvent's estate in possession, reversion, or remainder, except such property as may be by law exempt from execution, to some person appointed by the court or judge as assignee, and must approve the assignment as to form and manner of execution. The assignment must be recorded in the office of the register of deeds in such county, and in any other county in which any real estate conveyed thereby is situated. The petition, schedule, affidavit, and all testimony and other proceedings in the matter must be filed with the clerk of the circuit court, who shall thereupon enter in the judgment docket a judgment in favor of each of the creditors for the several sums respectively appearing to be due to them, and shall enter a discharge thereof upon such docket, which shall discharge the insolvent from personal liability only in respect to debts for which such judgments are rendered. Every such discharge is voidable within one year after the docketing of the discharge, if the insolvent swore falsely to any material fact concerning his estate or his debts; or if after the presentation of his affidavit he sell any of his property, or collect any of his debts, and fail to account therefor at the hearing, or to pay over the money; or if he shall secrete any of his property with intent to defraud his creditors; or if he fraudulently conceals the names of any of his creditors, or the amount of any of their claims, or pay or make any gift to any creditor upon express or implied contract or trust that the creditor so paid or awarded should abstain or desist from opposing the discharge of such insolvent, or if he should be guilty of any fraud whatever. If any creditor apply to the court for a new trial of the application for a discharge the insolvent may resist such application, but if the court be satisfied that any grounds exist for rendering such discharge voidable it shall make an order vacating such discharge and directing a new trial of the application for a discharge. The assignee shall convert the property assigned into money and distribute the same ratably without preference among the several creditors of such insolvent, and the court or judge may make all necessary orders for the payment of the fees and expenses, including compensation to said assignee.

Appeals may be taken to the supreme court by the insolvent or any creditor from the order granting or denying a discharge.

There is no involuntary insolvent law.

Assignments (WYOMING).—A statute of 1877 provides for assignments by insolvent debtors. The assignee has to give bond in a sum to be fixed by the probate judge. Creditors accepting from assignee their dividend are obliged by the statute to release the assignor from all further liability. Where a levy has been made under attachment, a general assignment will not affect such levy, unless the attachment be dissolved.

ATTACHMENT

(AND GARNISHEE PROCESS.)

Payment of Attached Funds After Service of Process.—Check Drawn Before may be Paid After.—Effect of Drawing Check.—Law of Place.—On August 10th, 1883, funds in the hands of the National Bank of America, Chicago, belonging to the Indiana Banking Company, were attached by the service of a garnishee writ, in a suit by the Metropolitan Grain and Stock Exchange. Judgment in favor of the latter company was obtained October 2d. After service of the writ of garnishment the National Bank paid several checks against the attached account—one dated August 7th, and one August 9th, the latter drawn to order of its own cashier. Both arrived by ordinary course of mail, and were paid on the 11th of August. The Supreme Court held that the bank had the right to make these payments. It is important to observe, however, that the decision was founded on a rule of Illinois law which does not prevail in the states generally, viz: that the drawing of a check operates to effect a transfer of the money on deposit, even before presentation, and that the holder of a check can sue the drawee bank in his own name to enforce payment. The Supreme Court said—"The legal effect of drawing these two checks was the reduction or drawing out of the bank the amounts therein specified, and lessen the fund to that extent that was subject to attachment, although not presented for payment until after process was served upon the garnishee. * * It is made a point against the allowance of these checks as credits or reductions from the funds in the hands of the garnishee, that by the laws of Indiana the drawing of checks by a depositor on his banker

does not operate to transfer the sums named in them to the payee, as is the rule in this State, and for that reason they are not proper credits for the garnishee. It is a sufficient answer to the position taken, that the law of the place of performance of a contract must govern. The checks, though drawn in the state of Indiana, were made payable in this State, and hence the law of this State is applicable, and must control. * * * * The other checks paid by the

garnisheedo not appear to have been drawn before the service of the writ, and as they were paid after the service of process that brings them within the operation of the rule, which forbids any assignment or transfer of the funds attached after the service of the writ and before the time for distribution."

At the date of the service of garnishment process the National Bank of America held a note of Wright & Co., to the order of the Indiana Banking Company, indorsed by the latter and discounted by the garnishee bank. The day after garnishment the Indiana Banking Company directed the Bank of America to pay the note out of the attached funds. The court, however, refused to allow this, and said the note was "simply the debt of A. L. Wright & Co., as to which attachment debtor was a mere surety or indorser in case default should be made in its payment by the principals. That might never occur." (National Bank of America v. Indiana Banking Co., 114 Ill., 483.)

Priority of Second Mortgage Over Subsequent Attachment.—Under a suit by Marshall, Field & Co., against C. D. and G. W. H., goods of the latter were attached and seized by a deputy United States marshal. The same goods were covered by a first mortgage to P. C. & T., and a second mortgage to S. The latter brought suit to recover possession of the goods. The deputy marshal justified his seizure under process of the United States Circuit Court, and also pleaded that P. C. & T. had a prior mortgage, and were thus entitled to possession instead of S. He further pleaded that he did not seize all the property covered by the mortgage, but left more than enough to satisfy it. There was judgment for S., and on appeal it was sustained by the Supreme Court, which said—

“The plaintiff was entitled to the possession of the goods as against all the world except the prior mortgagees, and can, we think, maintain an action for a taking which was not in pursuance of the prior mortgage and in defiance of the right of the first mortgagees.” (Sperry v. Etheridge, 30 North-Western Rep., 4; Iowa Sup. Court, Oct. 25th, 1886.)

Attachment without Security.—Valid Discrimination against Non-Resident or Foreign Corporation.—The Code of Nebraska, Section 200, provides that “when the ground of attachment is that the defendant is a foreign corporation, or a non-resident of the state, the order of attachment may be issued without an undertaking.” In a case of the kind thus contemplated, the objection was raised that the provision was in violation of Section 2, Article 4, of the Constitution of the United States, where it says that “the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.” The Supreme Court, however, maintained the validity of the Code provision, and said—“A plaintiff in attachment is liable in damages if he cause the defendant’s property to be attached maliciously and without probable cause. And this liability attaches whether a bond is given or not. But the failure to give a bond where the attachment is against the property of a non-resident is not sufficient ground upon which to base a motion to dissolve the same, and is not in conflict with the Constitution of this state, or of the United States.” (Marsh v. Steel, Nebraska Supreme Court, 1879.)

Preference of Attachment Creditors Over Non-Resident Assignee.—Halstead, Haines & Co., of New York, made an assignment to Lewis May, for the benefit of creditors, certain of whom were preferred. They owned real estate in Chicago, and the assignment was recorded there. The First National Bank of Attleboro’, Mass., a creditor of Halstead, Haines & Co., brought suit in Illinois, attaching the real estate in question. May, the New York assignee, thereupon intervened, claiming the property for distribution under the assignment. The Massachusetts attachment creditors had actual notice of the assignment before bringing their suit. The question

was, whether the New York assignee or the Massachusetts creditors were entitled to the property.

A. It was held that the latter had the better right. In a previous case (*Heyer v. Alexander*, 108 Ill., 385,) the Supreme Court decided that resident creditors who had attached the property of a non-resident debtor, were entitled to hold it against the non-resident assignee, the court holding that a voluntary assignment for creditors made in another state, "is only valid by the comity between the states, and the same comity in some cases imposes terms upon the conveyance for the protection of the inhabitants of the state where the property is situated." In the present case the court noticed the fact that Illinois law makes every provision in any assignment that provides for the payment of one debt or liability in preference to another, void, and went on to say—"The policy of the law of this State would hardly warrant the courts in lending their aid to a foreign assignee to withdraw effects, either real or personal, from the just claims of creditors of the insolvent debtors, and remove the same to another state, where, under the laws of that state, such creditors might get no part of their claims on account of the preferences given by the deed of assignment."

The court also said that it saw no reason for making a distinction between a resident and a non-resident creditor seeking the aid of the Illinois courts. They should, as a general rule, be admitted to the same rights under the law. "Had this attaching creditor been a corporation existing under the laws of New York and located in that State, where their insolvent debtors reside, a very different question might be presented. In such cases the courts of this state might not be willing to lend their aid to such a creditor to enable him to obtain an inequitable advantage over other creditors residing in the same state where the common fund is to be administered." (*May v. First National Bank*, 8 Western Reporter, 681.) (1887.)

Conflict of Federal and State Jurisdiction in Attachment and Intervention.—One of the most important cases to the practitioner recently decided by the Supreme Court of the United

States, is that of *Gumbel v. Pitkin*, (124 U. S., 131, rev'g 20 Fed. Rep., 426.) The immediate point in the decision turned on the question whether when property had been wrongfully seized by a marshal under a void attachment in the United States Court, and claims that his demand be paid, according to its lawful priority, out of the funds in the marshal's hands. The Circuit Court of the United States has refused to allow such creditor relief on his petition in the nature of intervention, on the ground that the state sheriff could not effectuate a lien nor levy on the property in the hands of the United States Marshal. The Supreme Court determined the question on broad principles which go much further than an attachment case. In the first place they sustained the right of a third person to intervene by petition whenever the process of the court is being abused to his injury, whether under mesne process or under execution; and hold that upon such application the court to whom it is made, and in whose exclusive custody the property in question is, ought to give complete legal or equitable relief as the case may require, and without regard to the citizenship of the complaining and intervening party. In the application of this principle to the controversy in question, Mr. Justice Matthews, delivering the opinion of the Court, says:

"It is certainly true, and must be conceded, as was adjudged in the court below, that Gumbel acquired under his writ of attachment no strict and technical legal standing as an attaching creditor with an actual levy on his debtor's property. There was no such actual seizure of the property by the sheriff as was necessary to constitute a levy at law. That seizure was prevented and the attempted levy thus defeated, by the wrongful and illegal act of the marshal. That officer had taken possession of the goods on Sunday, under color of process issued the same day, illegal by the laws of the state, and as such discontinued and abandoned by the parties. The possession thus acquired was made use of for the benefit of the plaintiffs in attachment in the Circuit Court to defeat the execution of the process of the State Court. It was illegal in the marshal to have taken possession of the goods under the writs in his hands issued on Sunday. It was

his duty when the sheriff appeared with a lawful writ from the State Court, to surrender possession to him. His failure and refusal to do so was an actionable injury in which the present plaintiff in error, in a suitable action at law, would have been entitled to recover, both against him and against the attaching creditors, for whom and at whose request he was acting, the whole amount of the loss, measured by what the plaintiff would have made if he had secured the benefit of the priority to which he would have been entitled by a first levy of his attachment upon the property. Instead of resorting to such an action, the plaintiff in error appealed to the Circuit Court for that equity which that Court was entitled to administer by virtue of its duty to redress injuries occasioned by the abuse of its process on the part of its officers and suitors. Why should that equity not be administered in this proceeding? The Court had before it all the parties, together with the property which was the subject of contention. The remedy was plain, simple and effectual. It could award to the intervenor the position in respect to the property and fund in court which, but for the injustice done him by the conduct of its officer and suitors in the abuse of its process, he would have acquired by a legal levy under his attachment."

Another general principle, of equal if not greater importance, which is supported by the decision is, that under a State statute, authorizing the State Court, in which various attachments have been levied, to determine the claims of the various creditors in respect to validity and priority, creditors proceeding in the State Court can in analogy to the State statute, although liberal conformity may not be practicable, give notice to the marshal and secure a constructive levy in the same manner as they might in a State Court. Upon this point Mr. Justice Matthews states the doctrine which is to guide the practitioner, as follows;

"There are difficulties in the liberal application of such a statutory provision, intended, of course, to regulate the practice between themselves of co-ordinate State Courts to cases of conflicting rights arising between suitors in the Federal and State Courts where the systems are independent. It is impossible to transfer suits pending in the State Courts into

the Circuit Courts of the United States, except as provided by act of Congress for the removal of such causes. Nevertheless, the substance of the provision may be applied to the practice of the courts in attachment proceedings in such a way as to promote and secure that comity which ought to prevail between Federal and State tribunals exercising concurrent jurisdiction, and to administer justice in a conflict of rights growing out of their independent action. Where, under a writ of attachment, the Marshal of the United States has first seized property and taken it into custody the exclusive jurisdiction of the Circuit Court is established over it and over all questions concerning it; but it ought not to follow that the property is thereby withdrawn from the assertion and enforcement of claims against it by those who must necessarily pursue their remedy in the first instance in a State Court. A creditor residing in the same state with the defendant, and therefore required to institute proceedings in the state tribunal, ought to be enabled, by his writ of attachment, to subject the property of the debtor in due course, and according to the order of priority, even though when the sheriff proceeds to execute the writ he finds that property in the possession of the Marshal of the United States, and, therefore, subject to the jurisdiction of the Federal Court. In that case no rule of law or of convenience is violated if he is permitted, by service of notice upon the marshal, to make a constructive levy upon the property, subject to all prior liens, and without disturbing the marshal's possession. This, of course, would not have the effect of subjecting the marshal personally or officially to answer as garnishee to the State Court as custodian of the property for the purpose of its jurisdiction, but would entitle the attaching creditor in the State Court to acquire a right in the property and to appear in the proceeding in the Circuit Court to enforce it on a motion to distribute the proceeds of the sale of the attached property in its custody. This is recognized in those states where successive attachments are authorized to be served by the same officer, acting as the executive of different courts, or by different officers, each acting independently of the other. There seems to be no reason why a similar practice should not be adopted as

between Federal and State tribunals acting concurrently in the administration of the same laws. Indeed, every consideration of justice and convenience might be adduced to support it. And such a practice in the courts of the United States, when authorized by law in the administration of attachment proceedings as between State Courts, seems to us to be justified as a reasonable implication from Section 915 of the Revised Statutes. That section expressly secures to plaintiffs in common law causes, in Circuit and District Courts of the United States, similar remedies by attachment against the property of the defendant to those provided by laws of the state in which such court is held for the courts thereof, and authorizes the courts of the United States, by general rules, to adopt, from time to time, such state laws as may be in force in the states where they are held in relation to the same subject. The remedies here spoken of, of course, are to be understood as they are defined in the State Laws, and subject to the same conditions and limitations. The authority thus conferred is ample to authorize and sanction the practice of permitting the obstructive levy by attaching creditors under state process upon the property in possession of the marshal, and their intervention in proceedings in the Circuit Court of the United States for the same district where, as between State Courts of concurrent jurisdiction, a similar method of acquiring and adjusting conflicting rights is prescribed. Under such a practice, if, in the present case, the marshal had acquired and held possession of the attached goods by virtue of a valid writ first levied, the plaintiff in error, by making his constructive levy, subject to the prior right and possession of the marshal, by giving him the appropriate notice of his claim to hold him as a garnishee in possession of the property for his benefit as to any surplus that might remain after payment of prior claims, would have thereby acquired the right, after establishing his claim by judgment in the State Court and presenting proper proof thereof, to appear in the Circuit Court as an intervener and secure his right to a share in the proceeds of the sale of the attached property in his proper order."

Attachments (ALABAMA)—May issue for the collection of a debt, whether due or not; for any money demand, the amount of which can be certainly ascertained; to recover damages for the breach of a contract where the damages are not certain or liquidated, or where the action sounds in damages merely; upon affidavit made by the creditor or his agent that the debtor absconds, secretes himself, or resides out of the State, so that process cannot be served upon him, or is about to remove his property out of the State, whereby the plaintiff may lose his debt or be compelled to sue for it in another State; or that the debtor has fraudulently disposed of, or is about fraudulently disposing of his property; or that he has money, property, or effects liable to satisfy his debts, which he fraudulently withholds, and stating the amount due, and that the attachment is not sued out for the purpose of vexing or harassing the debtor; and upon the plaintiff's executing a bond payable to the defendant in double the amount sworn to be due, an attachment may issue against the estate of the defendant, real and personal. Attachments auxiliary to suits pending may be issued on the same grounds as original attachments, in which case the suits proceed as if commenced by original attachment. (Code of Ala., § 3252.) Attaching creditors are paid in the order of time of the levy, and do not share *pro rata*.

The plaintiff, his agent or attorney, is required to enter into a bond in double the amount claimed by the plaintiff, with sufficient surety. The number of sureties is not fixed by statute, though two are usually required by the officer approving the bond. Sureties need not be the owners of real property. The plaintiff, his agent or attorney, may make the affidavit.

A non-resident of the State may sue out an attachment against the property of a non-resident for an existing debt, or ascertained liability, but the plaintiff, his agent or attorney, is required, in addition to the oath necessary in other cases, to swear that, according to the best of his knowledge, information, and belief, the defendant has not sufficient property within the State of his residence wherefrom to satisfy the debt; and must also give bond as in other cases, with surety resident in this State. (Code of Ala., § 3258.) Process of attachment may issue against foreign corporations having property in the State, for the recovery of debts, or to recover damages for a breach of contract when the damages are not certain or liquidated, or in cases where the action sounds in damages merely, in the same manner and subject to the same rules as in case of neutral persons residing without the State. (Ib., § 3263.)

When an attachment is sued out against a resident of the State, the cause stands for trial, and judgment may be obtained at first term of court, if notice of the levy is given to the defendant in person or in writing left at his residence in the county. If the residence of the defendant is in another county than that to which the attachment is returnable, written notice posted at the door of the court-house, and a copy sent by mail, addressed to the defendant, to the post-office nearest his residence, is requisite. (Code of Ala., § 3260.) Or, if the defendant resides without the State, the cause stands for trial at first term, if notice of the attachment and levy is given by advertisement for three successive weeks in a newspaper, a copy of which

must be sent by mail to the defendant, if his residence is known, or can be ascertained. (Pamph. Acts, 1882-83, p. 147.) Goods or chattels levied upon by attachment may be replevied by the defendant, or in his absence by a stranger, by the execution of a bond with sufficient surety, payable to the plaintiff, in double the value of the property replevied, with condition for the return of the property within thirty days after the rendition of judgment in favor of plaintiff. If the property is not delivered within thirty days after judgment, it is the duty of the sheriff to return the bond forfeited, and then executions may issue thereon against principal and sureties for the value of the property, as fixed by the sheriff or other officer, with interest thereon from date of the bond, and for the costs of the replevy and of the execution. (Pamph. Acts, 1880-81, p. 54.)

Attachments (ARIZONA).—In an action upon a contract for the direct payment of money, "which contract was made or is payable in this Territory" and is not secured by mortgage, lien, or pledge, etc., or, if secured, the security has been rendered nugatory by defendant, and in all cases brought upon contract against a non-resident, an attachment will be issued by the clerk upon receiving an affidavit showing the foregoing facts, and the further fact that the sum for which the attachment is asked is a *bona fide* debt, due and owing from defendant to plaintiff, and that the attachment is not sought, and the action is not prosecuted, to hinder, delay, or defraud any creditor of the defendant, and an undertaking in a sum not less than the amount claimed by plaintiff, with two sufficient sureties, to the effect that if the defendant recover judgment, or if the attachment shall be discharged on the ground that the writ was improperly issued, the plaintiff will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the attachment not exceeding the sum mentioned in the undertaking. The writ will be levied by the sheriff, and when (and not till so) levied it will become a lien upon all property of the defendant in the Territory not exempt from execution. This writ operates as a garnishment when served by the sheriff upon a debtor of defendant by delivering to and leaving with such debtor a copy of the writ and a notice that the debts owing by him to defendant are attached. The statute provides in detail how each class of property is to be attached. The lien of the attachment operates to secure any judgment which may subsequently be recovered in the action. Subsequent attaching creditors are entitled to only what is left after prior attachment liens are satisfied; each subsequent attachment ranks according to its date of levy, and is entitled to be fully satisfied before any subsequent attachment can hold any thing. The undertaking required before attachment can properly issue is the amount claimed by plaintiff, as shown by his affidavit, and that is the measure of liability in absence of malice; but plaintiff can only recover his actual damage in case attachment is set aside, which depends upon the proof in each case. The fees of counsel and attorneys in procuring dissolution have been held to be an element of damages which may be recovered in such a case.

Attachment (ARKANSAS).—The plaintiff in a civil action may, at or after commencement thereof, have an attachment against the property of the defendant, in actions for the recovery of money, where the action is against: First, a defendant, or several defendants, who, or some one of whom, is a foreign corporation or a non-resident of the State, notwithstanding plaintiff's non-residency; or, second, who has been absent from the State four months; or, third, has departed from the State with intent to defraud his creditors; or, fourth, has left the county of his residence to avoid the service of a summons; or, fifth, so conceals himself that a summons cannot be served upon him; or, sixth, is about to remove, or has removed his property, or a material part thereof, out of the State, not leaving enough therein to satisfy the plaintiff's claim, or the claim of defendant's creditors; or, seventh, has sold, conveyed, or otherwise disposed of his property, or suffered or permitted it to be sold, with the fraudulent intent to cheat, hinder, or delay his creditors; or, eighth, is about to sell, convey, or otherwise dispose of his property, with such intent. (Ib., § 309.) But an attachment shall not be granted, where the defendant is a foreign corporation or a non-resident, for any claim other than a debt arising upon contract.

Where there is more than one defendant, the estate or interest of such defendant, as embraced in the above subdivisions, is subject to the attachment.

In order to obtain the attachment the plaintiff must file in the office of the clerk (or the justice of the peace, as the case may be,) his complaint, under oath, showing the nature of his claim, that it is just, the amount which he believes he ought to recover, and the existence in the action of some one of the grounds of attachment above enumerated. The affidavit may be made by an agent or attorney.

The lien of an attachment will not be affected by subsequent general assignment.

The order of attachment is issued by the clerk or justice of the peace, on the plaintiff filing a bond, with one or more sureties, conditioned to pay all damages the defendant may sustain if the order is wrongfully obtained. The sureties need not be owners of real property.

Attaching creditors are entitled to satisfaction out of the attached property according to their respective priorities.

The sureties are responsible on the attachment bond for the amount of actual damages, which does not include attorney's fees or prospective profits.

Under a writ of attachment debts due the defendant may be garnished.

Attachments may be sued out, and the actions in which the same are obtained may be prosecuted in any county in which property may be attached, or a garnishee, who is indebted, or has property belonging to the defendant, is served with process.

The creditor may have an attachment before his debt is due when the debtor has disposed of the property with fraudulent intent, or has removed it out of the State, or is about to do either; the creditor first procuring an order for such attachment from the circuit judge or clerk.

Attachment (CALIFORNIA).—At the time of issuing the summons, or at any time afterward, before judgment, the plaintiff may have a writ of attachment against the property of the defendant, in an action upon a contract, express or implied, 1st, for the direct payment of money, where the contract is made or is payable in this State, when not secured by mortgage, lien, or pledge of personal property; or, if so secured, when such security has, without any act of the plaintiff or the person to whom the security was given, become valueless, and 2d, whenever the defendant in the action resides out of the State. A non-resident plaintiff is entitled to the writ equally with a resident.

The clerk of the court will issue the writ upon receiving the proper affidavit, and upon receiving a written undertaking on the part of the plaintiff in a sum of not less than two hundred dollars, for payment of costs and damages, should the defendant recover judgment. (C. C. P., §§ 537-539.) The sureties to the undertaking must be residents and householders or freeholders within this State. If the plaintiff be the State, or the people of the State, or any State officer in his official capacity, or any county, city, or town, no undertaking is required.

Affidavit for attachment must be made by plaintiff or some person in his behalf. Any competent person can make the affidavit. The affidavit must show that defendant is indebted to plaintiff upon a contract, express or implied, for the direct payment of money; that such contract was made or is payable in this State and is not secured by any mortgage or lien upon any real or personal property, or if originally so secured such security has become valueless without any act of plaintiff or the person to whom the security was given, or that the defendant is indebted to the plaintiff (specifying the amount) and is a non-resident of the State. (C. C. P., § 538.)

The writ requires the sheriff to attach sufficient of the property of the defendant to satisfy the plaintiff's demand, unless the defendant give him security to satisfy the same, or security equal to the value of the property to be attached. Several writs may be issued to different counties at the same time.

All property and interests in property, real and personal, belonging to the defendant, not exempt from execution, and all debts due the defendant, may be attached, and, if judgment be recovered, sold or collected to satisfy the same. Personal property capable of manual delivery, if attached, must be taken into the custody of the officer. Debts and credits and other personal property not capable of manual delivery are attached by leaving with the person owing such debts, or having in his possession or under his control such credits or other personal property, a copy of the writ and a notice that such property is attached in pursuance thereof. Real property is attached by filing with the recorder of the county where the same is situated a copy of the writ with a description of the property attached, and a notice that it is attached, and leaving a similar notice with the occupant, or, if there be no occupant, by posting the notice in a conspicuous place on said property. If the property stands upon the records in the name of a person other than

the defendant, the notice must state that the property and the interest of the defendant therein is attached, and must be given to such person or left at his residence, if it be known and within the county. Shares of stock in a corporation are attached by leaving with the proper officer of the corporation a copy of the writ and a notice stating that the stock or interest of the defendant therein is attached pursuant to the writ. If the property attached is perishable, and also when the court is satisfied that it will be for the interest of all parties, it may be sold, as if under execution, and the proceeds held by the sheriff or deposited in court to await the result of the suit.

The attachment first levied upon the property of the defendant has priority over any subsequent attachment, and all attachments are to be satisfied according to their priority.

The lien of the attachment on real property is merged in the lien of the judgment that the plaintiff may recover. Such lien relates to the date of the attachment and continues for the period of two years from the docketing of the judgment, with priority over all intervening liens or transfers. The sale of the property under execution must be made within the two years in order to preserve this priority of lien. An assignment under an adjudication in insolvency discharges every attachment levied within thirty days next preceding the commencement of the insolvency proceedings.

After the levy of the attachment the defendant may, by order of the court, have the same discharged, upon executing an undertaking to redeliver to the officer the property attached, or, in default thereof, pay its full value to the plaintiff.

The lien of the attachment is dissolved by the death of the defendant. The attachment may also be set aside by the court upon the ground that it was improperly issued. If the defendant recover judgment the sureties are liable for his costs, and also for what actual damage he may have sustained by reason of the attachment, not exceeding the amount named in their undertaking.

Attachment (COLORADO).—Property may be attached at any time before judgment upon the plaintiff filing his bond with sufficient surety in double the amount of the demand, and upon his filing an affidavit of himself, his agent or attorney, containing the nature and amount of the indebtedness, as near as may be, and any one of the following cases of attachment: 1st. That the defendant is not a resident of this State. 2d. That the defendant is a foreign corporation. 3d. That the defendant is a corporation whose chief office or place of business is out of the State. 4th. That the defendant conceals himself or stands in defiance of an officer, so that process of law cannot be served upon him, or that the defendant has for more than four months been absent from the State, or that for such length of time his whereabouts have been unknown, and that the indebtedness mentioned in the affidavit has been due during all the said period. 5th. That the defendant is about to remove his property or effects, or a material part thereof, out of this State with intent to defraud, or hinder, or delay his creditors, or some

one or more of them. 6th. That the defendant has fraudulently conveyed, or transferred, or assigned, his property or effects, so as to hinder or delay his creditors, or some one or more of them. 7th. That the defendant has fraudulently concealed, or removed, or disposed of his property or effects, so as to hinder or delay his creditors, or some one or more of them. 8th. That the defendant is about to fraudulently convey, or transfer, or assign his property or effects, so as to hinder or delay his creditors, or some one or more of them. 9th. That the defendant is about to fraudulently conceal, or remove, or dispose of his property or effects, so as to hinder or delay his creditors; or that such debtor has departed, or is about to depart, from this State, with the intention of having his effects removed from this State. 10th. That the defendant has failed or refused to pay the price or value of any article or thing delivered to him, which he should have paid for upon the delivery thereof. 11th. That the defendant has failed or refused to pay the price or value of any work or labor done or performed, or for any services rendered by the plaintiff at the instance of the defendant, and which should have been paid at the completion of such work, or when such services were fully rendered. 12th. That the defendant fraudulently contracted the debt, or fraudulently incurred the liability respecting which the suit is brought, or by false representations or false pretenses, or by any fraudulent conduct, procured money or property of the plaintiff. 13th. That the debt or demand is upon an overdue promissory note, or bill of exchange, or any other instrument for the direct payment of money or upon a book account.

An attachment may be had upon debts or demands not due, provided the affidavit states any one of the above causes except the first, second, and third. Property may be attached and garnishment proceedings had under the same writ. Attaching creditors who commence their actions at the same term of court share *pro rata* by statute. The United States courts refuse to entertain jurisdiction of attachment cases under the State attachment law, because of the difficulty in dividing the fund attached, not accepting the *pro rata* construction given to the statute by the State courts. Writs of attachment may issue on Sunday in urgent cases.

Attachment (CONNECTICUT).—Attachment of debtor's property cannot be had before debt is due. An attachment is served by attaching the goods or lands of the defendant, or, if no goods can be found, by attaching the person, when liable to attachment. Where wages only are attached, no costs shall be taxed in favor of the plaintiff unless it shall appear that demand was made upon the defendant for the payment of the claim sued for not more than thirty days nor less than three days prior to the bringing of such action. If the plaintiff is irresponsible, or a non-resident, a bond for costs is required from some substantial inhabitant of this State. This bond is simply to enable the defendant to collect his taxable costs in case he succeeds in the suit. No bond is required to indemnify the defendant for damages which he may suffer by reason of the attachment. Goods concealed in the hands of agents, so that they cannot be attached, or debts due from any person, are attachable by process of foreign attachment. Attachment holds

until the execution is levied, provided the execution be levied within sixty days after final judgment, when personal estate is attached, and within four months, when real estate is attached. Where several attachments of the same property are made, the debt and costs of suit of the first attaching creditor must first be fully satisfied, and subsequent attaching creditors in the order of their several attachments. No assignment of future earnings can prevent their attachment, when earned, unless made to secure a *bona fide* debt, the amount of which is therein stated, and the term definitely limited; nor unless recorded in the town clerk's office, and a copy thereof left with the employer.

Attachment (DAKOTA)—May issue in an action arising upon contract for the recovery of money only; or in an action for the wrongful conversion of personal property, against a foreign corporation; or against a defendant who is not a resident of this Territory; or against a defendant who has absconded or concealed himself; or whenever the defendant is about to remove any of his or its property from the Territory; or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete any of his or its property, with intent to defraud his creditors, or is about to remove from the county where he resides, with the intention of permanently changing his place of residence upon failing or neglecting to give security for the debt after its being demanded. The plaintiff, at the time of the issuing of the summons, or at any time afterwards, may have the property of the defendant attached as a security for the satisfaction of such judgment as he may recover. The warrant is granted by the clerk of the court in which the action is brought, upon affidavit made by the plaintiff, or other person having knowledge of the facts, specifying the amount of the claim and the grounds thereof; and stating, in the words of the statute, that the defendant is either a foreign corporation or not a resident of this Territory, or has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent; or that the debt was incurred for property obtained under false pretences; or that such corporation or person has removed, or is about to remove, any of his or its property from the Territory with intent to defraud his or its creditors; or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, any of his or its property with the like intent, whether such defendant be a resident of this Territory or not. Plaintiff must give resident security in an amount not less than two hundred and fifty dollars, and equal to the amount of the claim specified in the affidavit, by undertaking, proved or acknowledged as deeds of real estate, with one or more sureties resident of this Territory, who must justify as being residents and householders or freeholders within this Territory, and worth double the sum specified in the undertaking, over all his debts and liabilities and exclusive of all property exempt from execution by the laws of this Territory. (C. C. P., §§ 197-202.)

A non-resident can obtain an attachment against a non-resident, on the ground of the latter's non-residency

Real and personal property may be attached, including debts, credits, money, and bank-notes, except property exempt from execution. (C. C. P., §§ 197-202.)

Attachment may issue, in an action on a claim, before it is due, when a debtor has or is about to dispose of his property, or is about to remove his property, or a material part thereof, with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their claims, or when the debt was incurred for property obtained under false pretences. (C. C. P., §§ 217, 218.)

The execution of the attachment upon any such rights, shares, or any debts or other property incapable of manual delivery to the sheriff, must be made by leaving a certified copy of the warrant of attachment with the president or other head of the association or corporation, or the secretary, cashier, or managing agent thereof, or with the debtor or individual holding or occupying such property, with a notice showing the property levied on. (C. C. P., § 208.)

The responsibility of principal and surety on undertaking, when the attachment is vacated, is the damages actually sustained in consequence of the attachment.

Attachment liens on the same property have priority in the order in which the attachments are delivered to the officer for execution.

Attachment (DELAWARE).—A domestic attachment may be issued against an inhabitant after a return of *non est* to summons or capias delivered to officer ten days before return, and proof of cause of action; or upon affidavit made by plaintiff or other credible person and filed with the prothonotary, "that the defendant is justly indebted to the plaintiff in a sum exceeding fifty dollars, and has absconded from the place of his usual abode or gone out of the State with intent to defraud his creditors or to elude process as is believed." The proceeds of sales of property attached are distributed among all creditors equally, except that the creditors attaching and prosecuting the same to judgment are allowed a double share if such shall not exceed their debt.

A general assignment for the benefit of creditors, or proceedings under the insolvent law, will not affect levy, under either execution or attachment, prior to assignment.

No security is required of plaintiff. The defendant to discharge attachment must give real estate security in double the amount of the debt or demand. Not more than one sufficient surety is required. Attachment cannot issue on immatured claim.

A foreign attachment may be issued, even at the suit of a non-resident plaintiff, against any person not an inhabitant, after a return as above, or upon affidavit as above, "that the defendant resides out of the State, and is justly indebted to the plaintiff in a sum exceeding fifty dollars." It may also be issued against foreign corporations. The plaintiff has the benefit of his own discovery. Subsequent attaching creditors do not share *pro rata* with first attaching creditors. The superior court in term, or a judge in vaca-

tion, may investigate allegations of affidavit, except as to amount of debt or when it is due, and discharge attachment if no sufficient ground be shown.

Attachment (DISTRICT OF COLUMBIA).—Writ of attachment and garnishment may be issued whenever plaintiff, his agent or attorney, shall file in clerk's office, at commencement or during pendency of suit, an affidavit (supported by testimony of one or more witnesses) showing grounds upon which he bases action, and setting forth that plaintiff has just right to recover against defendant; and also stating either that defendant is a non-resident of the District; or evades service of ordinary process by concealing himself or withdrawing from the district temporarily; or has removed, or is about to remove, some of his property from the District to defeat just demands. Plaintiff must also file his undertaking with sufficient surety, to be approved by clerk, to make good all costs and damages by reason of wrongful suing out of attachment. One surety is sufficient; real estate owner not necessary, though usual. Attachment cannot issue except upon suit brought; if the right to sue is complete it may issue in the above cases. Subsequent attaching creditors do not share *pro rata*. First attaching creditor has a lien to the full amount of his demand. If attachment is set aside the judgment is against the plaintiff and surety in the undertaking to make good all costs and damages sustained by reason of the wrongful suing out of the writ.

If defendant, his agent or attorney, shall file an affidavit traversing plaintiff's affidavit, the court shall determine whether the facts set forth in the plaintiff's affidavit are true, and whether there was just ground for issuing writ of attachment; and if the facts do not sustain affidavit the court shall quash writ of attachment or garnishment; and this issue may be tried by a *a* judge at chambers, on three days notice.

The thing attached shall not be discharged from custody of officer seizing it until defendant shall deliver, either to the officer or to the clerk, to be filed in the cause, his undertaking, with sufficient surety, to satisfy and pay final judgment of court against him. If defendant fail to execute such undertaking, the court may sell thing attached whenever satisfied that it is in the interest of the parties it should be sold before final judgment. (Rev. Stat. D. C., §§ 782-784.)

Interrogatories in writing with copy of rule of court concerning attachment may be served on garnishee at time of service of attachment or any other time. And answer thereto under oath to such interrogatories must be filed within ten days, otherwise judgment against garnishee, as in case of condemnation.

(*Note*.—Justices of the peace have no jurisdiction in attachment on mesne process or in replevin. *Roach v. Van Riswick*, 7 Wash. Law Rep., 496.)

Attachment (FLORIDA).—Attachments may issue under the existing laws of this State upon the party applying for the same (although he be a non-resident of the State), or his agent or attorney, first making oath in writing before a justice of the peace or clerk of the circuit court that the amount of the debt or sum demanded is actually due, and that he or she has reason to

believe the party from whom it is due will fraudulently part with his, her, or their property before judgment can be recovered against him, her, or them, (as the case may be), or is actually removing his, her, or their property out of the State of Florida, or about to remove it out of the State, or resides beyond the limits thereof, or is actually removing or about to remove out of the State, or absconds or conceals himself or herself, or is secreting his or her property or fraudulently disposing of the same, or that he or she is actually removing or about to remove beyond the judicial circuit in which he, she, or they reside.

When any executor or administrator resides, or has removed, beyond the limits of this State, and there are assets of the testator or intestate in this State, it may be lawful for any person having a debt or demand against the estate of the deceased to take out an attachment against such assets, upon making oath in writing that the debt or sum demanded is actually due, and that the executor or administrator (as the case may be) resides or has removed beyond the limits of the State.

Writs of attachment may also be obtained, whether the debt or demand be due or not; provided that the same will become due within nine months from the time of applying for said writs of attachment; and provided also, that at the time of such application the person against whom the debt or demand is charged shall be actually removing his or her property beyond the limits of this State; or be fraudulently disposing of or secreting the same, for the purpose of avoiding the payment of his or her just debts and demands. Such writ of attachment as is herein provided for shall in no case be issued unless the party applying for the same, or his agent or attorney, shall first make oath in writing that the amount of the debt or demand claimed and charged against the opposite party is actually an existing debt or demand; stating also in said oath, in writing, the time when said debt or demand will actually become due and payable; and also that the party against whom the said writ of attachment is applied for is actually removing his or her property beyond the limits of this State, or (as the case may be) is fraudulently disposing of or secreting the same for the purpose of avoiding the payment of his or her just debt or demand; satisfactory proof of which shall be demanded and produced to the officers granting such attachment.

No attachment shall issue until the party applying for the same, by himself or by his agent or attorney, shall enter into a bond with at least two good and sufficient securities, payable to the defendant in at least double the debt or sum demanded, conditioned to pay all costs and damages the defendant may sustain in consequence of improperly suing out said attachment. It is not necessary that they be freeholders. (McClellan's Digest, pp. 111-114.)

Provision is made by act of 1875, ch. 2040, §§ 67-81, for the issuing of writs of attachment in courts of justices of the peace, where the sum demanded exceeds five dollars.

The grounds of attachment are similar to those enumerated above, to which may be added, "or that the defendant resides in any other county,

and more than one hundred miles from the residence of the justice; or that the defendant contracted the debt under fraudulent representations." In other respects the proceedings are similar to those prescribed by the circuit court. A general assignment will not affect prior attachments.

It was decided by the supreme court in the case of *Post v. Carpenter*, 3 Fla., 1, as between attaching creditors, that "there is no priority given to attaching creditors whose attachments have been first levied, if the judgments in the suits commenced by attachment were obtained at the same term of the court." The supreme court subsequently decided, in the case of *Zinn, Aldrich et al., v. Dzialynski*, 14 Fla., 187, that the lien of an attaching creditor has priority over a subsequent judgment and execution in a suit not commenced by attachment, though of prior date to the judgment and execution in the attachment suit. These decisions leave the question as to priority between attaching creditors, whose judgments are not obtained at the same term of the court, in some doubt; but we are inclined to the opinion, in such case, that the first attaching creditor would have priority.

The only measure of responsibility on the attachment bond, as expressed by statute, is the requirement that the same shall be "conditioned to pay all costs and damages the defendant may sustain in consequence of improperly suing out said attachment." The damages are matter of proof.

Attachment (GEORGIA)—May issue in the following cases, whether debt is due or not: 1st. When the debtor resides out of the State. 2d. When he is actually removing, or about to remove, without the limits of the county. 3d. When he absconds. 4th. When he conceals himself. 5th. When he resists a legal arrest. 6th. When he is causing his property to be removed beyond the limits of the State. 7th. When he is disposing or threatens to dispose of or conceals his property liable to the payment of his debts, or shall make a fraudulent lien thereon to avoid the payment of his debts.

Attachment lies at any time to recover the purchase money *when due*, of property sold, the property itself being liable to seizure, under attachment, and a lien of judgment attaches from date of the levy.

Before attachment can issue it must appear by affidavit of the party seeking it, his agent or attorney, that some of the grounds above enumerated exist; the amount claimed to be due must also appear in the affidavit. Bond with security, approved by the officer issuing the attachment, must accompany the affidavit, for at least double the amount sworn to, conditioned to pay the defendant all damages and costs he may sustain by reason of the attachment, if the plaintiff fails to recover. Any judge of the superior court, justice of the peace, or notary public, unless disqualified by some special cause, may administer the affidavit, take the bond, and issue the attachment. A non-resident may obtain attachment against property of non-resident in the State. The attachment, being issued, may be levied on any property of the defendant; garnishment may also be served on persons indebted to the defendant. Property levied on may be replevied, and the garnishment may be dissolved by defendant giving bond with good security to pay the amount the plaintiff may recover in the case. As between

attachments the first levied has priority, but a judgment on attachment has no priority over a judgment rendered in an ordinary suit, if both are obtained at the same term of the court. See *Assignments*.

In ordinary suits, either before or after judgment, as well as in case of attachment, the process of garnishment may issue against the debtors of the defendant, the plaintiff, his agent or attorney, making affidavit of the amount claimed to be due, and that he has reason to apprehend the loss of the same, or some part thereof, unless garnishment do issue, and also giving bond with good security in at least double the sum sworn to be due, conditioned to pay the defendant all damages and costs he may sustain, if the plaintiff fails in his suit, or it should appear that the sum claimed to be due on his judgment is not due. Persons served with garnishment are required to hold money, property, and effects in their hands belonging to the defendant, subject to the order of the court before which they are summoned to answer. Judgment, having been obtained against the defendant, may be entered also against the garnishee if he have effects in his hands; but the garnishing creditor obtains no priority over other creditors who obtain judgment at the same term, and is postponed to creditors who obtain judgment before he does.

Where the garnishee fails to answer at the first term, the case stands continued till the next term, at which time, if he is still in default, the plaintiff may have judgment against him for the whole amount recovered against the defendant.

All journeymen, mechanics, and day laborers are exempt from garnishment on their daily, weekly, or monthly wages. This does not apply to contracts for provisions, medicines, physician's services, or board for themselves and families, made prior to February 7th, 1876.

The maker of negotiable paper in the hands of the plaintiff's debtor is liable to a garnishment. (18 Ga., 650.)

Attachment (IDAHO).—The plaintiff at the time of issuing the summons, or at any time afterwards, may have the property of the defendant attached as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment, in the following cases: In an action upon a contract, express or implied, for the direct payment of money, where the contract is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, such security has without any act of the plaintiff, or the person to whom the security was given, become valueless; in an action upon a contract against a defendant not residing in this Territory.

The justice of the peace, or clerk of the court, issues the writ upon receiving an affidavit by or on behalf of the plaintiff, showing that defendant is indebted to plaintiff, specifying the amount over and above all legal set-offs and counter claims upon an express or implied contract for the direct payment of money, and that the payment has not been secured, and that the debt is *bona fide* and owing from defendant to plaintiff, and that the attachment is not sought and action not prosecuted to hinder, delay, or defraud

creditors; and also an undertaking on part of plaintiff in a sum not less than two hundred dollars, nor exceeding the amount claimed by plaintiff, with two sufficient sureties. (2d Sess., pp. 172, 173; 3d Sess., p. 91; 7th Sess., p. 25.) Proceeds of attachment are applied in the order of levy. A warrant of attachment will not issue unless the claim is due.

When the property of the defendant is in the form of a debt, credit, or other personal property not capable of manual delivery, or the personal property in the possession of another, such property may be garnished.

Attachment (ILLINOIS)—May issue, when the *debt* exceeds twenty dollars, in the following cases: 1. Where the debtor is a non-resident. 2. When he conceals himself, or stands in defiance of an officer, so that process cannot be served upon him. 3. Where he has departed, or (4) is about to depart from the State, with the intention of having his effects removed therefrom. 5. Where he is about to remove his property from the State to the injury of creditors. 6. Where he has, within two years preceding the filing of the affidavit, fraudulently conveyed, or assigned, or (7) concealed, or disposed of his effects, or a part thereof, so as to hinder or delay his creditors. 8. Where he is about fraudulently to conceal, assign, or otherwise dispose of his property or effects so as to hinder or delay his creditors. 9. Where the debt was fraudulently contracted,—the statements which constituted the fraud being in writing, and signed by the debtor, his agent or attorney. Affidavit by the creditor, his agent or attorney, must be filed, stating the nature and amount of the indebtedness, after allowing all just credits and set-offs, and any one or more of the causes mentioned, and the place of residence of the defendant, if known; and, if not known, that upon diligent inquiry affiant is unable to ascertain the same. Bond, with sufficient surety, in double the amount of the debt, is required, conditioned for satisfying all costs which may be awarded to the defendant or to any others interested in the proceedings, and all damages and costs which shall be recovered against the plaintiff for wrongfully suing out the attachment. Plaintiff, if a non-resident, must also give a separate bond for costs. The sheriff, or other officer executing the attachment writ, if instructed to levy on personal property, requires a further separate bond for his individual protection. All judgments in attachment against the same defendant, returnable at the same term of court, and all judgments against him in suits by summons, *capias*, or attachment, recovered at that term, or at the term when the first attachment judgment is obtained, share *pro rata*; but if the property attached is recovered through the diligence of one creditor, he may be allowed a priority. Additional writs may issue to other counties where the defendant has property. Persons having in their possession property or credits belonging to the defendant, or who are indebted to him, may be garnished without further bond. Any appearance by the defendant changes the action *in rem* to an action *in personam*: and though the attachment be quashed, the suit will proceed as if commenced by summons. Attachments may likewise issue in aid of a suit already pending, or of a *scire facias* issued to make a person party to a judgment. (Hurd, 150.)

Attachment (INDIANA).—Process of attachment may be had at the commencement, or in aid of a suit, by any plaintiff, either resident or non-resident, against the property of a defendant, where the action is for the recovery of money, when the defendant is a foreign corporation or a non-resident, secretes himself, or is about leaving or has left the State, or is removing his property therefrom, or has sold or is about selling or disposing of his property, with intent to defraud his creditors. Writs of attachment issue only upon the proper affidavit filed and written undertaking given to prosecute the attachment and to pay the defendant all damages he may sustain, if the proceedings of the plaintiff shall be wrongful or oppressive. No special number of sureties are required, nor need they be freeholders or householders necessarily. They must satisfy the officer taking and approving the security. The bond and affidavit must be filed before the writ issues. Attachment proceedings are only auxiliary to a regular suit. Personalty is first attached, then real estate if necessary. After the property of a defendant is attached, any other creditors may file their affidavit and bond, enter complaint, and prove their claims as parties to the action, at any time before final adjustment of the suit. If judgment be rendered in attachment and the property sold, the money realized from sale and garnishees, after paying costs and expenses, is, under direction of the court, paid to the several creditors *pro rata* on the amount of their claims as adjusted. There is no advantage gained by the original attaching creditor over others. (R. S. 1881, § 913 *et seq.*, and § 643 *et seq.*)

A recent statute makes the wages of laborers an exception to the general rule of attachment above given. (R. S. 1881, §§ 958, 959.) It is now a misdemeanor to send or cause to be sent out of the State any debt to be collected by proceedings in attachment, garnishment, or other mesne process, when the creditor, debtor, and person or corporation owing for the earnings intended to be reached, are each and all within the jurisdiction of the courts of this State, or to assign such debt to be so collected outside of the State. (R. S. 1881, §§ 2162, 2163.)

After March 27th, 1879, no court in this State shall have or entertain jurisdiction in any action of attachment, garnishment, or supplementary proceedings, when the plaintiff and principal defendant are both non-residents of this State, and the money sought to be reached by such attachment, etc., is the personal earnings or wages due or owing to the principal defendant from any person or corporation doing business in this State. (R. S. 1881, § 958.)

Affidavits to procure process of attachment, garnishment, *ne exeat*, replevin, and the like, must contain the statutory facts, and may be made by the party or his agent, or any other person in his behalf. There are no special provisions for attorneys making affidavits in behalf of their clients; they stand just as the client.

Attachments cannot issue upon claims not due except where the defendant has left, or is secretly leaving the State, is removing property necessary to secure plaintiff out of the State, or has or is about to dispose of property with intent to defraud his creditors. (R. S. 1881, § 913.)

Subsequent attaching creditors share *pro rata* with first attaching creditors are liable in damages assessed at the discretion of the jury if it shall appear that the proceedings were wrongful or oppressive.

Attachment (Iowa).—All property not exempt from execution may be attached by filing a sworn petition verified by the party, or, if facts are known to his agent or attorney, by such agent or attorney, alleging: 1st, that the defendant is a foreign corporation or acting as such; or, 2d, that he is a non-resident of the State; or, 3d, that he is about to remove his property out of the State without leaving sufficient remaining for the payment of his debts; or, 4th, that he has disposed of his property (in whole or in part) with intent to defraud his creditors; or, 5th, that the defendant is about to dispose of his property with intent to defraud his creditors; or, 6th, that he has absconded so that the ordinary process cannot be served upon him; or, 7th, that he is about to remove permanently out of the county, and has property therein not exempt from execution, and that he refuses to pay or secure the plaintiff; or, 8th, that he is about to remove permanently out of the State, and refuses to pay or secure the debt due the plaintiff; or, 9th, that he is about to remove his property, or a part thereof, out of the county with intent to defraud his creditors; or, 10th, that he is about to convert his property, or a part thereof, into money for the purpose of placing it beyond the reach of his creditors; or, 11th, that he has property or rights in action which he conceals; or, 12th, that the debt is due for property obtained under false pretenses.

The property of a debtor may be attached before the debt becomes due, when nothing but time is wanting to fix an absolute indebtedness, if the petition, in addition to that fact, states, 1st, that the defendant is about to dispose of his property with intent to defraud his creditors; or, 2d, that he is about to remove from the State, and refuses to make any arrangements for securing the payment of the debt when it falls due, and which contemplated removal was not known to the plaintiff at the time when the debt was contracted; or, 3d, that the defendant has disposed of his property in whole or in part with intent to defraud his creditors; or, 4th, that the debt was incurred for property obtained under false pretenses.

The sheriff must levy upon property fifty per cent greater in value than amount of claim, but before writ can issue plaintiff must file bond, with one or more sureties, who must make oath that they are residents of the State, worth double the sum to be secured, and owning property in this State subject to execution equal to the sum to be secured, in penalty double the amount of property sought to be attached.

The sheriff shall summons such persons as garnishees as the plaintiff may direct; and attachment by garnishment is effected by leaving with the person a written notice that he is required not to pay any debt due by him to defendant, or thereafter to become due, and that he must retain possession of all property of said defendant then or thereafter in his custody or under his control, in order that the same may be dealt with according to law; and plaintiff may direct sheriff to take the answers of garnishee or to require him to appear at next term of court to answer such interrogatories as may be

propounded to him. (Title XVIII., ch. 1.) A valid attachment levied before assignment will not be affected thereby.

Attachment liens have priority in the order of their levy. Attaching creditors do not share *pro rata*; the one having the first lien must be first paid, and the others in the order of their levy.

In an action on an attachment bond the plaintiff may recover, if he shows that the attachment was wrongfully sued out, and that there was no reasonable cause to believe the ground upon which the same was issued to be true, the actual damages sustained and reasonable attorneys' fees to be fixed by the court; and if it be shown that such attachment was sued out maliciously, he may recover exemplary damages. He can maintain the action on the bond as an independent proceeding, without waiting until the principal suit is determined, or he can maintain it as a counter claim in the attachment suit.

Attachment (KANSAS).—In an action for the recovery of money, an attachment may be had against the property of the defendant (and this attachment may be obtained as well by a non-resident as by a resident of this State). The affidavit of the plaintiff, his agent or attorney, must be made at or after the commencement of the action, stating the nature of the plaintiff's claim, that it is just, the amount which the affiant believes the plaintiff ought to recover, and the existence of some one or more of the following grounds: First, when defendant, or one of several defendants, is a foreign corporation or a non-resident of the State (but in this case for no other claim than a demand arising upon contract, judgment, or decree, unless the cause of action arose wholly within the limits of this State, which fact must be established on the trial); or second, when the defendant, or one of several defendants, has absconded with the intention to defraud his creditors; or third, when the defendant has left the county of his residence to avoid the service of a summons; or fourth, so conceals himself that a summons cannot be served upon him; or fifth, is about to remove his property or a part thereof out of the jurisdiction of the court, with the intent to defraud his creditors; or sixth, is about to convert his property or a part thereof into money for the purpose of placing it beyond the reach of his creditors; or seventh, has property or rights in action which he conceals; or eighth, has assigned, removed, or disposed of, or is about to dispose of, his property or a part thereof, with the intent to defraud, hinder, or delay his creditors; or ninth, fraudulently contracted or incurred the debt, liability, or obligation on which the suit is brought; or tenth, where the suit is brought for damages arising from the commission of some felony or misdemeanor, or the seduction of any female; or eleventh, when the debtor has failed to pay for any article or thing delivered, for which by contract he was bound to pay upon delivery. (§ 3717.)

Where a debtor has sold, conveyed, or otherwise disposed of his property, with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts, or is about to make such sale, conveyance, or disposition of his property with such fraudulent intent, or is

about to remove his property or a material part thereof with the intent or to the effect of cheating or defrauding his creditors or of hindering or delaying them in the collection of their debts, a creditor may bring an action on his claim before it is due and have an attachment against the property of the defendant, but an order of the judge of the court must be had allowing such attachment.

To obtain and attain an attachment an undertaking must be given on the part of the plaintiff in double the amount of the claim, with one or more sureties, to be approved by the clerk of the court, or in an action before a justice of the peace, to be approved by the justice. Sureties need not be owners of real estate. No bond or undertaking, is, however, required, if the parties defendant are all non-residents of the State or a foreign corporation. (§ 3719.)

Subsequent attaching creditors do not share with first attaching creditors, but in the order in which they are levied.

Attachment (KENTUCKY).—The plaintiff may have an attachment against the property of the defendant, or of a garnishee, in an action for the recovery of money, where the action is against: 1. A defendant, or several defendants, who, or some one of whom, is a foreign corporation, or a non-resident of the State; or, 2. Who has been absent therefrom four months; or, 3. Has departed from the State with intent to defraud his creditors; or, 4. Has left the county of his residence to avoid the service of summons; or, 5. So conceals himself that a summons cannot be served upon him; or, 6. Is about to remove or has removed his property, or a material part thereof, out of this State, not leaving enough therein to satisfy plaintiff's claims, or the claims of said defendant's creditor's; or, 7. Has sold, conveyed, or otherwise disposed of his property, or suffered or permitted it to be sold, with the fraudulent intent to cheat, hinder, or delay his creditors; or, 8. Is about to sell, convey, or otherwise dispose of his property with such intent. But an attachment shall not be granted on the ground that the defendant or defendants, or any of them, is a foreign corporation or a non-resident of this State, for any claim other than a debt or demand arising upon contract. To obtain an attachment, the plaintiff must file an affidavit, showing: 1. Nature of plaintiff's claim. 2. That it is just. 3. The amount which the affiant believes the plaintiff ought to recover; and, 4. The existence of some one of the grounds above enumerated. No attachment will issue until bond and security is given in double the amount of claim, with probable costs. One surety is sufficient. Must have property in this State subject to execution, double amount of bond. An attachment and garnishment may also be granted against a defendant who has no property in this State subject to execution, where the plaintiff's debt would be endangered by delay. (Code of Practice, title 8, ch. 3.)

Before a debt or liability on contract becomes due an equitable action may be brought for indemnity, and an attachment against defendant's property or order of arrest obtained by order of court on similar grounds as above stated and after bond given as above provided. (Civil Code, §§ 237-248.)

Several orders of attachment against a defendant have precedence according to the time of their delivery to sheriff, (Code, § 202,) but if the property attached be a fund in court, and several orders be executed on same day, they will be satisfied ratably. (Code, § 207.)

If attachment be discharged, as having been wrongfully obtained, the liability of the sureties on the bond is for the damage which defendant may have sustained by reason of the attachment, not exceeding double the amount of plaintiff's claim. (Code, § 198.)

Attachment (LOUISIANA).—Writs of attachment will issue in the following cases: When the debtor resides out of the State, or has permanently left, or is about permanently to leave it; when he conceals himself in order to avoid the service of citation; when he has mortgaged, assigned, or disposed of, or is about to mortgage, assign, or dispose of his property, rights, or credits, or some part thereof, with intent to defraud his creditors, or give an unfair preference to some of them; when he has converted, or is about to convert, his property into money or evidences of debt, with intent to place it beyond the reach of his creditors. When the debtor is about to remove his property out of the State before his debt becomes due and exigible. A creditor wishing to attach must petition the proper judge, stating the facts which render the writ necessary, and setting forth the nature and amount of his claim. To obtain such attachment the creditor, or his attorney in fact, must swear to the existence of the debt demanded by him, and that he verily believes that the debtor has left the State permanently, or is on the eve of leaving the State permanently; or that he resides out of the State, or conceals himself so that citation cannot be served on him, or that he has mortgaged, assigned, or disposed of, or is about to mortgage, assign, or dispose of his property, rights, or credits, or some part thereof, with intent to defraud his creditors or give an unfair preference to some of them; or that he has converted, or is about to convert, his property into money or evidences of debt, with intent to place it beyond the reach of his creditors; or that he is about to remove his property out of the State before the debt becomes due. When the creditor resides out of the State and has no attorney in fact here, his attorney at law in the case, admitted to practice here, may make the affidavit. It will be sufficient for the attorney in fact, and attorney at law, to make oath to the best of their knowledge and belief. The creditor must also furnish his bond in a sum equal to that which he claims, with one solvent surety residing within the jurisdiction of the court, conditioned for the payment of all damages sustained by defendant or other parties, in case it shall be decided that the attachment was wrongfully obtained. It is not requisite for sureties to be owners of real property. In cases where the debt or obligation is not yet due, attachment may be granted on the oath of the creditor, his agent or attorney, to the existence of the debt and the requisites enumerated above. Non-residents are entitled to this remedy as well as residents. Attaching creditors are paid in the order of the date of their attachment. In cases of illegal attachments with probable cause, defendant is entitled to recover the damages and loss actually

sustained thereby. If the attachment be unfounded, malicious, and without probable cause, vindictive and exemplary damages may be recovered.

Sequestration.—Writs of sequestration will issue in the following cases: 1. When one who had possessed for more than one year has been ejected by violence, and sues to be restored to his possession. 2. When one sues for the possession of movable property, and fears that the party having possession may ill-treat it, send it out of the jurisdiction of the court, or conceal, part with, or dispose of it during the pendency of the suit. 3. When one claims the ownership or possession of real property, and has good reason to apprehend that the defendant may make use of his possession to dilapidate or to waste the fruits or revenues produced by such property, or convert them to his own use. 4. When a wife sues for separation from bed and board, or only a separation of property from her husband, and has reason to apprehend that he will ruin her dotal property, or waste the fruits or revenues produced by the same during the pendency of the suit. 5. When one has petitioned for a stay of proceedings, and a meeting of his creditors, and such creditors fear that he may avail himself of such stay of proceedings to place the whole, or a part of his property, out of their reach. 6. When a creditor having a special mortgage apprehends that the property of the debtor will be removed out of the State before he can have the benefit of his mortgage, and will make oath of the facts which induced his apprehension. 7. In all cases when one party fears that the other will conceal, part with, or dispose of the movables in his possession, during the pendency of the suit. 8. And generally, the plaintiff may cause to be sequestered any property upon which he has a lien or privilege.

A plaintiff wishing to obtain an order of sequestration must annex to the petition the affidavit of himself or attorney, stating the cause of action, and making oath to the requisites enumerated above as to the cause for which he claims said writ, and must execute his obligation in favor of the clerk of the court, for such sum as the judge shall determine, with the surety of one good and solvent person residing within the jurisdiction of the court, for damages arising in case such sequestration should have been wrongfully obtained.

Provisional Seizure.—Writs of provisional seizure may issue: 1st, when the plaintiff sues on a title importing confession of judgment; 2d, when the lessor prays for the seizure of furniture or property used in the house or attached to the real estate he has leased; 3d, when a seaman, or another person, prays that the ship or water-craft navigating within the State, on which he was employed, may be detained till his claim is paid, or persons having furnished material for, or made repairs to, such ship or water-craft; 4th, when the proceedings are *in rem*, that is to say, against the thing itself which stands pledged for the debt; when the property is abandoned, or where the owner is unknown or absent; 5th, laborers on farms or plantations, whether they are employed by the day, month, or year, when they sue for their wages, shall have the right to seize provisionally the crop or other thing on which they have a privilege, for such employment, by making oath

that they verily believe the crop or other thing on which they have a privilege is about to be removed from the farm, plantation, or place where it was raised, or, if it has been already removed, that they verily believe it is about to be sold or disposed of so as to deprive them of their privilege. The plaintiff is not required to give any bond in order to obtain a provisional seizure, but is liable to the defendant for any damages sustained by his wrongful acts.

Attachment (MAINE).—Attachments of any real or personal property of defendant not exempt, are as of course on mesne process, upon direction of plaintiff, without affidavit, bond, or order of court. Officer is liable, if the attachment be wrongful, and entitled to indemnity before making the attachment, if any doubt. They are dissolved: 1. By assignment under insolvency of defendant on proceedings begun within four months. 2. By death of defendant, and a commission of insolvency before levy. 3. By judgment for defendant. 4. By lapse of thirty days, or in case of absent defendant one year and thirty days after judgment, without levy. No other creditors share. Personal property may be appraised and sold on the writ, (unless a bond is given,) and proceeds held. It is essential to an attachment of real estate that the plaintiff's claim be specified particularly in the declaration. Where property is attached in a suit against one joint owner, any other may have it appraised and give bond and receive it. Incumbered chattels may be attached by paying incumbrances. Stock in corporations is attached by leaving a copy of writ, with notice of attachment, with clerk, cashier, or treasurer. Corporate property and franchises of toll corporations may be attached and levied on. No attachment can be made until debt is payable. (Ch. 81, §§ 24–61.)

Attachment (MARYLAND)—Is authorized in this State against any kind of property or credits belonging to the defendant in the hands of the plaintiff, or of any one else, or unoccupied real estate, in cases where the defendant is, 1st, a non-resident of this State (notwithstanding the plaintiff be a non-resident). 2d, where he absconds—and one may become an absconding debtor without leaving the State. The above attachments are issued by the clerk of court, on warrants from a judge or justice of the peace. An affidavit that defendant is *bona fide* indebted, and has absconded, or is a non-resident, accompanied by the evidences of indebtedness, that is, account, note, bond, etc., is required before the warrant is granted. The affidavit required may be made before any justice of the peace, or any judge of a court of law in this State, or before any judge of a court of record of the United States, or of any State, District, or Territory of the United States, or before a commissioner appointed by this State to take acknowledgment of deeds, or before a notary public, or, if out of the United States, before a consul or vice-consul of the United States. The affidavit may be made by the creditor, or one of them, where more than one, or by the agent of the creditor or creditors, by the president, cashier, or other officer of a corporation, by any executor or administrator, or by guardian of an infant, or by the infant himself, or by the husband of a married woman, or by the committee of a lunatic. (Revised Code, Art. 67, IV.) 3d. On original process

based on account, note, bond, or other evidence of debt, with affidavit made before clerk of court from which attachment shall issue, that defendant named in writ is *bona fide* indebted, and that plaintiff knows or has reason to believe, first, that the debtor is about to abscond from this State; or, second, that the defendant has assigned, disposed of, or concealed, or is about to assign, dispose of, or conceal his property, or some portion thereof, with the intent to defraud his creditors; or, third, that the defendant fraudulently contracted the debt, or incurred the obligation respecting which the action is brought; or, fourth, that the defendant has removed, or is about to remove his property, or some portion thereof, out of this State, with the intent to defraud his creditors. Every clerk before issuing an attachment on original process must take from the plaintiff, or some person on his behalf, a bond to the State with security, to be approved by the clerk in double the sum claimed, for satisfying all costs which may be awarded to such defendant, or to any other person interested, and all damages which may be recovered against the plaintiff for wrongfully suing out such attachment. 4th. Attachment on judgment or decree is treated as an execution and governed by like rules. An execution by way of attachment may issue at any time within twelve years from date of judgment. 5th. Where two summonses have been returned *non est* against a defendant, the plaintiff, on proof of his claim by affidavit and the production of the written evidence of the debt, if any, shall be entitled to an attachment, and thereupon the proceedings are the same as against absconding debtors. An attachment levied on the property of a person who is afterwards declared an insolvent is a lien on such property if levied before the application, and is not dissolved by the proceedings in insolvency. 6th. The proceeding by attachment against the property of a married woman to the value of one thousand dollars, authorized by Art. 51, § 23, of the Revised Code, has been repealed by the act of 1882, ch. 235. This latter act authorizes proceedings against a married woman, without limiting the amount, by suit as if she were a single woman, and property earned by her industry or skill may be taken in execution to satisfy judgments against her. 7th. In actions for illegal arrest or false imprisonment, for amount of damages claimed. Attachment proceedings are strictly construed. The salary of a public officer, or employee of a municipal corporation, or funds in hands of government due its agents, are not attachable; nor property or funds in custody of law; or under control of a court, in hands of its trustee. Wages, hire, or salary not due at date of attachment, of whatever kind, cannot be attached, and the sum of one hundred dollars, out of what is due, is exempted. (48 Md., 130; 52 Md., 41.) Justices of the peace have jurisdiction in attachments where the claim is under one hundred dollars. See Hinkley and Mayer on "Law of Attachments in Maryland." As to procedure by claimants of property, attached or taken in execution, not belonging to defendant, and as to sale of perishable property attached, see Revised Code, Art. 67, IV., §§ 41, 43, 47.) Act of 1880, ch. 28, provides that no judgment or condemnation *nisi* shall be made absolute where the garnishee has failed to appear or plead, without proof by the plaintiff of his case, in the same manner as in cases of judg-

ments by default *ex parte*. Subsequent attaching creditors do not share *pro rata* with first attaching creditors. The assets are distributed according to priority in laying attachments—the first attaching creditors being paid in full, provided there are sufficient assets, then the second, etc.

Attachment (MASSACHUSETTS).—(P. S., ch. 161.) All real and personal estate liable to be taken on execution may be attached upon the original writ, in equity as well as at law, and held as security to satisfy such judgment as the plaintiff may recover, but no attachment of real estate can be made on a writ returnable before a trial justice, or municipal, district, or police court, unless the debt or damage demanded exceeds twenty dollars. This means the *ad damnum* in the writ, which is generally double the real debt.

No bond is required to make an attachment, but if the plaintiff be a non-resident the writ must be indorsed by an inhabitant of this State as security for costs.

Where the attachment is of live animals, or of property perishable or which cannot be kept without too great expense, the same may be sold and the proceeds held subject to the attachment; so if all parties consent in writing to a sale.

Mortgaged personal property in the possession of the mortgagor may be attached and the mortgagee summoned as trustee for examination; if he is not so summoned the attaching creditor must pay or tender to the mortgagee the amount due on the mortgage within ten days after written demand, or the attachment will be dissolved.

Shares of stock in corporations organized under the laws of this State, or under the laws of the United States when located or having a general office in this State, may be attached by service upon certain officers of the company. The delivery of a stock certificate to a *bona fide* purchaser or pledgee for value, with a written transfer or power of attorney to transfer, transfers title, as against all parties; but right of corporation to treat holder of record as holder in fact is not affected until transfer is recorded. (Stat. 1884., ch. 229.)

Cars and engines in use on railroads, and steamboats in use on water routes, cannot be attached within forty-eight hours of regular trips, unless a previous demand for other attachable property is refused or neglected.

No ship or vessel shall be attached in an action at law unless a declaration is first inserted in the writ, and affidavit made before a mastery in chancery or certain other magistrates by the plaintiff or in his behalf, that he has a good cause of action and reasonable expectation of recovering at least one-third the damages demanded.

During the pendency of any suit, libel, petition, or other proceeding at law or in equity where an attachment is allowed, an arrest of the defendant or an attachment of his property by trustee process or otherwise may be made by a special precept on motion to the court.

Attachments by trustee process or otherwise may be dissolved at any time before final judgment, by defendant giving bond with sureties, with condi-

tion to pay to the plaintiff the amount, if any, he may recover, within thirty days after final judgment, or within the same time after special judgment, if such is given.

An attachment may also be dissolved by giving a bond to pay, in like manner, the value of the property attached. And in trustee process by adverse claimant giving bond to pay the sum for which the trustee may be charged, not exceeding the value of the property in his hands, or so much thereof as will satisfy the amount recovered.

The assignment in insolvency proceedings dissolves all attachments not made more than four months prior to the first publication of such proceedings,—otherwise attaching creditors take precedence in the order of their respective attachments.

Attachment (MICHIGAN).—Creditors may proceed in the circuit courts by attachment against the property of their debtors by making and annexing to the writ an affidavit of “the plaintiff, or some one in his behalf,” stating that the defendant therein is indebted to the plaintiff, and specifying the amount of such indebtedness as near as may be over and above all legal set-offs (which amount must exceed one hundred dollars), and that the same is due upon contract express or implied or upon judgment, and containing a further statement that deponent knows or has good reason to believe either—1st. That the defendant has absconded, or is about to abscond from this State, or that he is concealed therein to the injury of his creditors; or 2d. That the defendant has assigned, disposed of, or concealed, or is about to assign, dispose of, or conceal any of his property with intent to defraud his creditors; or 3d. That the defendant has removed or is about to remove any of his property out of this State with intent to defraud his creditors; or 4th. That he fraudulently contracted the debt or incurred the obligation respecting which the suit is brought; or 5th. That the defendant is not a resident of this State, and has not resided therein for three months immediately preceding the time of making such affidavit; or 6th. That the defendant is a foreign corporation. (H. S., p. 1981.)

A creditor may also proceed by attachment in justice’s court in any action founded on a judgment or on a contract, express or implied, if the plaintiff or some one in his behalf shall make and file with the justice an affidavit specifying as near as may be the amount due to him, and that he knows or has good reason to believe either—1st. That the defendant has assigned, disposed of, or concealed, or is about to assign, dispose of, or conceal any of his property with the intent to defraud his creditors; or 2d. That he is about to remove any of his property from the county in which such application is made, or from the county where the defendant resides, with the like intent; or that he has removed or is about to remove himself or his property from the county, and refuses or neglects to pay or to secure the payment of the debts; or 3d. That he fraudulently contracted the debt or incurred the obligation respecting which the suit is brought; or 4th. That the defendant has absconded, to the injury of his creditors, or does not reside in this State, and has not resided therein for one month immediately preceding the time of

making the application; or 5th. That the defendant is a foreign corporation.

One day may intervene between the date of the jurat and that of the writ; and when the person making the affidavit lives in any other county in this State, one day may intervene for each thirty miles between his residence and the place where the writ is issued. The effect of attachment in either case is to hold the property until judgment can be obtained and an execution issued and levied. The defendant may have the property returned by executing a bond to pay the judgment. See *Assignments*. A non-resident may proceed by attachment against another non-resident, if any property can be found here upon which to levy. But in that case, unless the defendant should appear, he would not be bound by the judgment, and the plaintiff's procedure would be one simply *in rem* against such property as he could reach.

Before the writ issues the plaintiff must file with the justice a bond to the defendant in the penal sum of two hundred dollars, with sufficient sureties to be approved by the justice, conditioned to pay the defendant all damages and costs he shall sustain by reason of the issuing of the writ, if the plaintiff shall fail to recover judgment in the suit; and if the plaintiff's demand shall exceed one hundred dollars, the penalty of the bond must be double the amount of such demand.

No suit can be commenced by attachment unless the debt is due; and in the circuit court the amount over and above all legal set-offs must be one hundred dollars. The property levied upon remains in the hands of the officer unless the defendant, or the person in whose hands he finds the property, shall at some time before judgment give a bond to the officer, with two or more sureties, in a penalty double the amount specified in the affidavit annexed to the writ as due, and conditioned for the payment of the judgment which may be recovered in the suit within sixty days after its rendition, or the bond may be in double the appraised value of the property, and conditioned that the property shall be produced to satisfy any execution that may be issued upon the judgment. Upon delivery of such bond to the officer he surrenders the property, but the progress of the suit is not in any way affected. Other creditors may proceed against the same defendant and levy upon the same property, and the officer shall hold any such successive attachments in the order in which they were received.

After a suit has been commenced and before judgment, the plaintiff shall be entitled to a writ of attachment whenever sufficient cause shall be shown, as pointed out above; and there may be an attachment and also a garnishment in the same proceeding, and they may be issued at the time of commencement of the suit or at any time afterwards before judgment.

The defendant in any case may apply to a judge of the circuit court or to a circuit court commissioner of the county where the writ issued for a dissolution of the attachment. Upon this hearing proofs may be taken, and the burden is upon the plaintiff to make out a case. The judge or commissioner may order the attachment to be dissolved and the property restored; but he may also require the defendant to enter his appearance in the action prior to the dissolution. Appeal may be taken from the commissioner's order to the circuit court. (Laws of 1881, p. 337; H. S., § 8030.)

In practice the officer usually calls upon the plaintiff to give him a bond before taking possession of property under a writ of attachment. This bond is simply to protect the officer against any suit for damages which may be brought for the taking and the detention in case the levy should not be sustained, or in case the property should prove to belong to a third person. There is no statute requiring such a bond, but the officer is at liberty to demand it before proceeding.

Attachment (MINNESOTA)—Is allowed in action for recovery of money against property of defendant, at the time of issuing summons, or any time thereafter, and are allowed in favor of residents and non-residents without distinction, on the same grounds. They are not allowed unless a cause of action has accrued. Writ obtained from the judge of a district court, or commissioner of the court where suit is brought, when it appears by affidavit made by the plaintiff, his agent or attorney, that a cause of action exists against the defendant, specifying amount and ground thereof; that defendant is a foreign corporation or non-resident, or has departed from the State as deponent verily believes, with intent to defraud or delay his creditors, or to avoid service of summons, or keeps himself concealed with like intent; or that he has assigned, secreted, or disposed, or is about to dispose, of his property, with intent to delay or defraud creditors, or that the debt was fraudulently contracted. Before writ issues, bond is required from plaintiff, with sufficient sureties, that he will pay all costs and damages which may be sustained by defendant by reason of the attachment, in case defendant recovers judgment in the action or if the writ shall be set aside or vacated. Penalty not less than two hundred and fifty dollars; and sureties, by rule of court, must be residents and freeholders, and justify in full amount of bond. (Laws of 1885, p. 114.)

There is no statutory provision as to rights and liabilities of attaching creditors as among themselves, nor as to measure of damages or bond, except that damages cannot exceed the penalty. Attachments become a lien on property in the order of time of their levy thereon, and subsequent attaching creditors cannot pro rate with earlier ones.

A writ of attachment is not allowed in cases of libel, slander, seduction, breach of promise of marriage, false imprisonment, or assault and battery. (Ch. 66, §§ 130, 131; Laws of 1867, p. 110; G. S. 1878, ch. 66, §§ 145-148.)

In a justice's court a writ of attachment cannot issue except in case of indebtedness upon a contract express or implied, or upon judgment or decree of some court. The affidavit is similar to that required in courts of record, and the bond is conditioned that if the plaintiff fails to recover judgment, he will pay all costs that may be adjudged against him and all damages which the defendant may sustain by reason of the attachment, not exceeding the sum of one hundred dollars. (Ch. 65, §§ 91, 93; G. S. 1878, ch. 65, §§ 98, 100.)

Attachment (MISSISSIPPI).—Attachments may issue for the collection of all debts, and claims for damages growing out of the breach of any contract, and claims founded on any of the penal laws of this State, when the creditor.

his agent or attorney, makes and files an affidavit setting forth the amount and character of the debt, and charging one or more of the following grounds: 1. That the defendant is a foreign corporation, or a non-resident of this State. 2. That he has removed, or is about to remove himself or his property out of this State. 3. That he so absconds or conceals himself that he cannot be served with a summons. 4. That he contracted the debt or incurred the obligation in conducting the business of a ship, steamboat, or other water-craft in some of the navigable waters of this State. 5. That he has property or rights in action which he conceals and unjustly refuses to apply to the payment of his debts. 6. That he has assigned or disposed of, or is about to assign or dispose of, his property or rights in action, or some part thereof, with intent to defraud his creditors. 7. That he has converted, or is about to convert, his property into money or evidences of debt, with intent to place it beyond the reach of his creditors. 8. That he fraudulently contracted the debt or incurred the obligation for which suit has been or is about to be brought. They may issue for a debt not due, if sued out on either the sixth, seventh, or eighth ground, or if the creditor affirm that he has just cause to suspect, and verily believes, that the debtor will remove himself, or his effects, out of the State, before said debt will become payable, with intent to hinder, delay, or defraud his creditors; or that he hath removed, with like intent, leaving property in this State.

Before the writ can issue the creditor must execute a bond with one or more sureties, in double the amount of the debt claimed, conditioned to pay all such damages as the defendant shall sustain by the wrongful suing out of the attachment, and costs. Sureties need not be land-owners.

Non-residents may attach; and all attachments are triable the first term. The process may be levied on lands and tenements, money, goods, chattels, and debts of the defendant wherever found; and a garnishment clause may be added to the writ.

Defendant may contest the grounds of the attachment as a preliminary and separate issue. If successful he may recover his actual damages for the wrongful issuance of the writ; and if the jury shall certify in their verdict that they believe the attachment was sued out recklessly or wantonly and without probable cause, or with intent to oppress the defendant, then any damages the jury see fit to impose shall stand, unless the court shall certify that the same is grossly unconscionable or wholly unwarranted by the facts. (This last provision has not yet been adopted by the United States courts in Mississippi, and probably will not be.)

The act of March 11th, 1884, gives to the creditors of the attached debtor the right to intervene and defend the suit, either by traversing the attachment affidavit, or by showing that the debt is simulated. (Neither has this provision yet been adopted by the United States courts in Mississippi.)

In the State courts a successful contest of the grounds of attachment will abate both the writ and the suit, and judgment will be entered against the plaintiff for the costs and damages; but in the United States courts such successful contest does not abate the suit, and plaintiff may proceed to judg-

ment, crediting said judgment with the amount of damages recovered by the defendant.

The plaintiff cannot defeat the defendant's right to recover damages by dismissing the suit.

Attachments, when successive, have priority in the order of their respective levies. If the attachment is dissolved, the damages recoverable on the attachment bonds are the actual damages caused by the wrongful attachment; and each attaching creditor is liable for the damages caused by his own attachment, and none other.

Attachment (Missouri)—To aid a summons may be obtained at any time, by resident as well as non-resident plaintiffs, when it appears and can be proven that the defendant, 1st, is not a resident of this State; or, 2d, that defendant is a corporation whose chief office or place of business is out of this State; or, 3d, that defendant conceals himself so that the ordinary process of law cannot be served upon him; or, 4th, that defendant has absconded or absented himself from his usual place of abode in this State, so that the ordinary process of law cannot be served upon him; or, 5th, that defendant is about to remove his property or effects out of this State with intent to defraud, hinder, or delay his creditors; or, 6th, that defendant is about to remove out of this State with the intent to change his domicile; or, 7th, that defendant has fraudulently conveyed or assigned his property or effects so as to hinder or delay his creditors; or, 8th, that defendant has fraudulently concealed, removed, or disposed of his property or effects so as to hinder or delay his creditors; or, 9th, that defendant is about fraudulently to convey or assign his property or effects so as to hinder or delay his creditors; or, 10th, that defendant is about fraudulently to conceal, remove, or dispose of his property or effects so as to hinder or delay his creditors; or, 11th, that the debt sued for was contracted out of this State, and defendant has absconded or secretly removed his property or effects into this State; or, 12th, that the damages for which the action is brought arose from the commission of some felony, or misdemeanor, or the seduction of a female; or, 13th, that defendant has failed to pay the price or value of the article or thing delivered, which by contract he was bound to pay upon delivery; or, 14th, that the debt sued for was fraudulently contracted on the part of the defendant. Attachments can be had in "any civil action" if one of the above-mentioned grounds therefor exists. And such attachment can be had for a debt not yet due except in the cases above specified as the first four grounds for an attachment; but no judgment till the debt matures. To entitle the plaintiff to an attachment he or some one for him must file with the clerk of the court an affidavit stating that he has a just demand against the defendant, and that the amount which the affiant believes the plaintiff ought to recover, after allowing all just credits and set-offs, is dollars, and that the affiant has good reason to believe and does believe in the existence of one or more of the foregoing grounds for attachment, specifying them in the language above set out. The plaintiff must also, at the time of filing such affidavit, file a bond signed by him or

some responsible person as principal, and one or more securities, resident householders of the county in which the action is brought, in a sum at least double that sworn to in the affidavit, and conditioned for the prosecution of the action without delay and with effect, to refund all sums that may be adjudged to be refunded to defendant or found to have been received by the plaintiff and not justly due him, and also for the payment of all costs and damages that may accrue to defendant or any garnishee by reason of the attachment or any process or proceeding in the suit or any judgment or process thereon. The attachment may be levied on real estate as well as personalty, and debts may be garnished thereunder. If the ground of the attachment is denied under oath, and upon a trial plaintiff fails to substantiate his affidavit, the attachment will abate, but the suit proceeds to judgment, unless the demand be one not due at the date of the writ.

If two or more creditors levy an attachment at the same time, which proves insufficient to pay their debts in full, they will share the fund *pro rata*; and priority in levying the attachment secures priority of right (provided the attachment is sustained) to the entire fund until the debt sued for and costs are paid in full. If an attachment is set aside or dismissed the attaching creditor, whether prior or subsequent, is liable for such damages on his attachment bond as resulted from his own levy and the proceedings thereunder.

Attachment (MONTANA).—All property not exempt from execution may be attached by filing sufficient bonds in double the amount claimed, if it be less than one thousand dollars; if more than ten thousand dollars, then in that amount; and an affidavit showing that the defendant is indebted to the plaintiff upon a contract, express or implied, for the payment of money, gold dust, or other property then due, which is not secured by a mortgage lien or pledge upon real or personal property; or, if so secured, that the security has become insufficient by the act of the defendant or other means. Attachments may also be had before demand is due: if defendant is leaving, or about to leave the Territory with all his or her property, moneys, or other effects which might be subjected to the payment of the debt, for the purpose of defrauding his creditors; or that defendant is disposing of, or about to dispose of his property subject to execution, for the purpose of defrauding his creditors, which must appear by affidavit.

The sheriff is directed in the writ to attach sufficient property to cover the demand of the plaintiff. Credits or other personal property in the possession or under the control of another are attached by the sheriff serving upon such person a copy of the writ and a notice that such credits, other property, or debts, as the case may be, are attached, etc. (See Code of Civil Procedure, ch. 4, title VII., adopted February 16th, 1877.)

Attachment (NEBRASKA) AGAINST PROPERTY.—The plaintiff in an action for the recovery of money may, by attachment, secure a lien on any property of a defendant subject to execution, when he is a foreign corporation or non-resident; when he has or is about to remove his property from the jurisdiction of the court, assign, remove, or dispose of or convert to money, or

conceals his property to defraud his creditors; when he absconds to defraud creditors, or leaves county of residence to avoid service of summons, or fraudulently contracted or incurred the subject of the action. When the ground of attachment is that defendant is a foreign corporation or non-resident, the claim must be debt or demand arising on contract, judgment, or decree. (14 Neb., 457.) A bond in double the amount claimed is required, except when the said defendant is a foreign corporation or a non-resident. (Rev. Stat., p. 424, § 198.) Where the ground of the attachment is that the defendant is a non-resident no undertaking is required. (Grebe v. Jones, 15 Neb.) As to plaintiffs, there is no distinction between residents and non-residents. The distinction as to the necessity of bond on account of place of residence is made only as to defendants. The affidavit may be made by the plaintiff, his agent or attorney, showing nature of the plaintiff's claim, that it is just, the amount which affiant believes the plaintiff ought to recover, and the existence of some one of the grounds for attachment above-mentioned. (C. S., p. 555, § 199; *Dorrington v. Minnick*, 15 Neb.) Statute does not say what kind of property surety shall have. There must be one or more sureties. (C. S., p. 555, § 198; p. 556, § 200; 2 Neb., 14; 3 Ib., 73; 4 Ib., 62; 9 Ib., 96, 234, 409.)

The mere fact of removal of property out of the jurisdiction of the court, unless it be done with the intent to defraud creditors, does not give the right of attachment. (14 Neb., 496; *Hunter v. Soward*, 15 Neb.)

A creditor may bring an action on a claim before it is due, and have an attachment against the property of the debtor; when the debtor has sold, conveyed, or otherwise disposed of his property, or is about to make such sale, conveyance, or disposition of his property, with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts, or when he is about to remove his property or a material part thereof with the intent or to the effect of cheating or defrauding his creditors, or of hindering or delaying them in the collection of their debts. (Gen. Stat., p. 564, § 237; 6 Neb., 527; 9 Ib., 297; C. S., p. 561, § 237; *Philpot v. Newman*, 11 Neb.)

When there are several attachments against the same defendant they shall be executed in the order in which they are received by the sheriff. (C. S., p. 556, § 204.) Subsequent attachments are subject to prior ones. (C. S., p. 557, § 210.) Attachment binds property from time of service. (C. S., p. 557, § 212.) Statute does not undertake to marshal extent of the responsibility on bonds of prior and subsequent attachments.

Attachment (NEVADA).—The plaintiff at the time of issuing the summons, or at any time afterwards, may have the property of the defendant attached as security for the satisfaction of any judgment that may be recovered, unless the defendant gives security to pay such judgment. First. In an action upon a contract for the direct payment of money made, or by the terms thereof payable in this State, which is not secured by mortgage, lien, or pledge upon real or personal property situated or being in this State, or, if so secured, when such security has been rendered nugatory by the act of

the defendant. Second. In an action upon a contract against a defendant not residing in this State.

The clerk of the court shall issue the writ of attachment upon receiving an affidavit to be made by the plaintiff, or any one in his behalf, setting forth the necessary facts as above, and also showing that the sum for which the attachment is asked is an actual *bona fide* existing debt due and owing from the defendant to the plaintiff, and that the attachment is not sought, and the action is not prosecuted, to hinder, delay, or defraud any creditor of the defendant. Before issuing the writ the clerk shall require a written undertaking in a sum not less than two hundred dollars, nor exceeding the amount claimed by the plaintiff, in gold coin, with sufficient sureties to the effect that if the defendant recover judgment the plaintiff will pay all costs that may be awarded to the defendant, and all damages he may sustain by reason of the attachment. Each attachment is satisfied in the order in which the levy under it is made.

Real estate, personal property, debts, and credits, may be attached in the manner pointed out by statute.

Attachment (NEW HAMPSHIRE).—Most actions are commenced by attachment; and all property which may be taken upon execution may be attached and holden as security for the judgment the plaintiff may recover. (G. L., 517.)

Real estate is attached by the officer leaving an attested copy of the writ and of his return thereon with the town clerk of the town where the property is situated. (G. L., 518.)

All movable property is taken possession of by the officer on making the attachment. The attachment of lumber, brick, and other bulky articles, may be preserved by leaving an attested copy of the writ and officer's return thereon with the town clerk, as in the attachment of real estate, within twenty-four hours after the attachment is made, without retaining actual possession thereof. In all cases where an attachment is made a summons must be served upon the defendant, which must briefly give him the same information that is given in the original writ. (G. L., 519.)

The property of the defendant in the hands of a third person, and debts due the defendant, may be attached by trustee process, service being made upon the defendant and trustee as in a writ of summons. No trustee is chargeable for pensions or bounty money, or the services or earnings of the wife or minor children of the defendant, or the defendant's own earnings after service of writ. If the claim against the defendant is not for necessities furnished him or his family, twenty dollars of his earnings before service of writ on trustee is also exempt. (G. L., 574.)

Property attached is holden for thirty days from the rendition of judgment, and the levy of the execution must be commenced within that time.

No valid attachment can be made to secure claims not due at the commencement of the action. Attaching creditors acquire a lien in the order of their attachments, and do not share in the attached property *pro rata*.

Attachment (NEW JERSEY).—Writ of attachment may issue upon filing with the clerk of the court out of which writ is about to issue, an affidavit by the creditor, or in his absence his agent, that his debtor absconds from his creditors, and is not to his knowledge or belief a resident of the State at the time. Or that the debtor is not to his knowledge or belief a resident of this State at this time, and owes to the plaintiff a certain amount, specifying the amount as nearly as he can. The claim of the plaintiff must, it is thought, be an accrued debt. It must be a debt, not unliquidated damages.

A non-resident of this State can obtain an attachment against the property and credits of another non-resident, except against wages or salary due from an employer resident within this State to a non-resident employee, when wages or salary are not subject to attachment in the State where the latter resides.

A corporation not created nor recognized by the laws of this State is liable to proceedings in attachment, if service of summons cannot be made as stated below.

Other creditors than the original plaintiff, whether their debts are due or not, may be admitted under the attachment, on application to the court, or to the auditors appointed to adjust the demands, before they have made their report. Applying creditors share *pro rata* with the plaintiff. No bond is required of the plaintiff or of the applying creditors. Under the writ of attachment the property and estate of the defendant may be seized and sold, and garnishee process issued against his debtors. Real estate may not be sold until twelve months after the seizure under the writ. (Rev., p. 16.)

A general assignment for the benefit of creditors will not affect a levy made under an attachment prior to such assignment.

An attachment may be dissolved by the debtor entering appearance and giving freehold security in double the amount of the claims.

Attachment (NEW MEXICO).—Creditors whose demands amount to fifty dollars may sue in the district court by attachment in the following cases, namely: 1st. When the debtor is not a resident of nor resides in this Territory. 2d. When the debtor has concealed himself, or absconded or absented himself from his usual place of abode in this Territory, so that the ordinary process of law cannot be passed upon him. 3d. When the debtor is about to remove his property or effects out of the Territory, or has fraudulently concealed or disposed of the same, so as to hinder, delay, or defraud his creditors. 4th. When the debtor is about fraudulently to convey or assign, conceal or dispose of his property or effects, so as to hinder, delay, or defraud his creditors. 5th. When the debt was contracted out of this Territory and the debtor has absconded or secretly removed his property or effects into the Territory with intent to hinder, delay, or defraud his creditors. 6th. When the defendant is a corporation whose principle office or place of business is out of the Territory, unless such corporation has a designated agent in the Territory upon whom service of process may be made in suits against it. 7th. When the defendant has fraudulently contracted the debt, incurred

the obligation, or obtained credit from the plaintiff by false pretences, respecting the matter for which the suit is brought. Attachment may issue upon a claim or demand not matured.

Shares or any interest in any corporation doing business in the Territory, whether domestic or foreign, may be attached in the following manner: "The officer in whose hands the attachment is placed shall indorse an entry thereon of his levy on the corporate shares or interest of the defendant, and shall forthwith serve a copy of the attachment so indorsed upon the president of the company or corporation at the office of the company, or by leaving the same at the usual and most notorious place of doing business of such company or corporation in this Territory, which entry and service shall amount to and be considered a seizure of said corporate interest or shares, to all intents and purposes, and under an execution issued on such attachment may be sold as in other cases of ordinary execution."

There is no distinction between resident and non-resident plaintiffs. A non-resident plaintiff may sue out a writ of attachment against a non-resident, and attach property on the ground of the non-residence of defendant.

The writ may be sued out by filing with the clerk of the court a bond payable to the Territory in double the sum of the amount claimed, signed by two or more sureties, and conditioned that the plaintiff shall prosecute his said action without delay and with effect, refund all sums of money that may be adjudged to be refunded to the defendant, and pay all damages that may accrue to any defendant or garnishee by reason of said attachment or any process of judgment thereon, which said bond must be approved by the clerk, and also by filing an affidavit in the following form, to wit:—

TERRITORY OF NEW MEXICO, } ss.
COUNTY OF

This day personally appeared before me, the undersigned, clerk of the court, A. B., (or C. D., agent for A. B.), and being duly sworn says that E. F. is justly indebted to the said A. B., after allowing all just offsets, and that the said E. F. is (setting forth one of the causes of attachment).

A. B., (or C. D., agent for A. B.)

Sworn to and subscribed before me this day of A. D. 18

G. H., Clerk.

The affidavit may be made and bond executed by an agent. The sureties must be residents of the Territory. The proceedings are prescribed by the Compiled Laws.

The attachment may be dissolved by successfully contesting the truth of the ground of attachment specified in the affidavit, and then the suit proceeds as an ordinary action. In this respect the proceedings by *capias* and attachment differ from each other, as in *capias* a successful contest of the truth of the affidavit abates the cause. The writ of attachment is in the usual form, and runs against all the property, money, goods, chattels, effects, and credits of the defendant.

Attachment (NEW YORK).—The warrant is issued by the judge of the court where the action is brought or any county judge. (C. P., § 638.)

Real and personal property may be attached, provided it be shown by

affidavit that the defendant is a foreign corporation or a non-resident; or, if a natural person and a resident; that he is fraudulently absent or concealed; or, if a natural person or domestic corporation, that the same has fraudulently removed or concealed his or its property or is about so to do (this proviso does not apply to subdivision 4, *infra*;) (1) in actions for breach of contract other than contract to marry; (2) in actions for wrongful conversion of personal property; (3) in actions for injury to personal property through negligence, fraud, or wrongful act; (4) in actions for money only where the defendant has misappropriated, or aided or abetted the misappropriation of the property of the State or any portion or department thereof. (C. P., §§ 635, 637.)

Security, not less than two hundred and fifty dollars, must be given for costs and damages, except in case under subdivision 4, *supra*. (C. P., § 640.)

Attachment (NORTH CAROLINA).—At the time of the issuing of the summons, or at any time afterwards, an attachment may issue in the following cases, to wit: When the action is to recover a sum of money only, or damages for one or more of the following causes: 1. Breach of contract, express or implied. 2. Wrongful conversion of personal property. 3. Any other injury to personal property in consequence of negligence, fraud, or other wrongful act.

To entitle the plaintiff to a warrant he must show by affidavit to the satisfaction of the court granting the same: 1. That one of the causes of action specified above exists against the defendant. If the action is to recover damages for breach of contract, the defendant must show that the plaintiff is entitled to recover a sum stated therein, over and above all counter claims known to him. 2. That the defendant is either a foreign corporation, or not a resident of the State; or, if he is a natural person, and a resident of the State, that he has departed therefrom, with intent to defraud his creditors, or to avoid service of summons, or keeps himself concealed therein with like intent; or, if the defendant is a natural person, or a domestic corporation, that he or it has removed, or is about to remove, property from the State, with intent to defraud his or its creditors; or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, property with the like intent.

The affidavit upon which the warrant is granted must be filed with the clerk of the court to which, or magistrate before whom, the warrant is returnable, within ten days from the issuing of the warrant. (§ 355.)

A written undertaking "with sufficient surety," to secure all defendant's costs and damages, in a sum not less than two hundred and fifty dollars, must be given by the plaintiff. The statute does not require that sureties to the above undertaking be freeholders, nor does it specify the number required. (§ 356.)

The affidavit can be made by plaintiff's agent. (*Bruff v. Stern*, 81 N. C., 183.)

Attachments may be taken out in cases within the jurisdiction of justices

of the peace, as well as in those within the jurisdiction of the superior courts. Non-resident plaintiffs can attach in all cases that residents can. (§ 353.) If several attachments are levied on the same property at different times they take precedence in the order in which they were respectively levied.

Attachment (OHIO).—The plaintiff in a civil action in the court of Common Pleas or in the superior court of Cincinnati, for the recovery of money, may, at or after the commencement thereof, have an attachment against the property of the defendant upon the following grounds: 1. When the defendant, or one of several defendants, is a foreign corporation, or a non-resident of the State; or, 2. Has absconded with the intent to defraud his creditors; or, 3. Has left the county of his residence to avoid the service of a summons; or, 4. So conceals himself that a summons cannot be served upon him; or, 5. Is about to remove his property, or a part thereof, out of the jurisdiction of the court, with the intent to defraud his creditors; or, 6. Is about to convert his property, or a part thereof, into money for the purpose of placing it beyond the reach of his creditors; or, 7. Has property or rights in action which he conceals; or, 8. Has assigned, removed, or disposed of, or is about to dispose of, his property, or a part thereof, with the intent to defraud his creditors; or, 9. Fraudulently or criminally contracted the debt or incurred the obligation for which suit is about to be or has been brought. The supreme court of this State has construed the word "obligation" as co-extensive with liability, so that under the ninth head an attachment may issue upon a liability incurred in a case of tort as well as in cases of contract.

But an attachment shall not be granted on the ground that the defendant is a foreign corporation or a non-resident of this State, for any claim other than a debt or demand arising upon contract, judgment, or decree, or for causing death by a negligent or wrongful act. (R. S., § 5521.)

An order of attachment is made by the clerk of the court in which the action is brought, when there is filed in his office an affidavit of the plaintiff, his agent or attorney, showing: 1st. The nature of the plaintiff's claim; 2d. That it is just; 3d. The amount which the affiant believes the plaintiff ought to recover; and 4th. The existence of some one of the foregoing grounds for an attachment. (R. S., § 5522.)

When the ground of the attachment is that defendant is a foreign corporation, or a non-resident of the State, the order may issue without an undertaking. In all other cases the order of attachment cannot be issued by the clerk until there has been executed in his office, by sufficient surety of the plaintiff, to be approved by the clerk, an undertaking in a sum equal to double the amount of the plaintiff's claim, to the effect that the plaintiff will pay the defendant all damages which he may sustain by reason of the attachment, if the order be wrongfully obtained. As to the number of sureties required in order to obtain an attachment, the law of this State simply requires sufficient surety to be approved by the clerk of the court issuing the attachment. In practice, however, such clerks usually require two sureties, resident of the county, owners of real estate equal to double the amount of

the plaintiff's claim, over and above any incumbrance that may be upon the same. (R. S., § 5524.)

In a civil action before a justice of the peace an order of attachment may be issued upon the same grounds and in a similar manner as in the Common Pleas court, except that the non-residence of the defendant needs be of the county only, and a corporation having no officer upon whom a summons can be served, or place of business in the county, or being a non-resident of the county, is liable to attachment. The affidavit in attachment before a justice of the peace must state that the property sought to be attached is not exempt from execution. And if the personal earnings of the defendant are sought to be attached, the affidavit must show that the defendant is not the head of a family, or that such earnings are not for services rendered within three months before the commencement of the action, or that, being earned within that time, said earnings amount to more than one hundred and fifty dollars, and that only the excess over that amount is sought to be attached. But no proceedings shall be had to garnish the salary or wages of the employee of a railroad company by reason of his non-residence, except before a justice in, and on account of his being a non-resident of, the county in which his liability was incurred. (R. S., § 6489.)

Where a debtor has sold, conveyed, or otherwise disposed of his property with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts; or is about to make such sale, conveyance, or disposition of his property with such fraudulent intent; or is about to remove his property, or a material part thereof, with the intent or to the effect of cheating or defrauding his creditors, or of hindering or delaying them in the collection of their debts, a creditor may bring an action on his claim before it is due, and have an attachment against the property of the debtor. But such attachment can only be granted by the court in which the action is brought or by a judge thereof, and before such attachment can be granted, the plaintiff, his agent or attorney, shall make an oath in writing showing the net amount of the plaintiff's claim, that it is just, when it will become due, and the existence of any one of the grounds for attachment hereinbefore enumerated. The court or judge granting the attachment shall specify the amount for which it is allowed, not exceeding a sum sufficient to satisfy the plaintiff's claim and the probable costs of the action. The order of attachment shall not be issued until there is executed in the clerk's office an undertaking as in cases of attachment upon obligations for liabilities already due. The plaintiff shall not have judgment on his claim until it is matured. (R. S., §§ 5564, 5565.)

When the plaintiff, his agent or attorney, shall make oath, in writing, that he has good reason to and does believe that any person or corporation in the affidavit named has property of the defendant in his possession, describing the same, if the officer cannot get possession of such property, he shall leave with such garnishee a copy of the order of attachment, with a written notice that he appear in court and answer under oath all questions put to him touching the property, of every description, and credits of the defendant

in his possession or under his control. If the garnishee does not reside in the county in which the order of attachment is issued, the process may be served by the proper officer of the county in which the garnishee resides, or may be personally served. If the garnishee is a person the copy of the order and notice shall be served upon him personally, or left at his usual place of residence; if a partnership, garnished by its company name, they shall be left at its usual place of doing business; and if a corporation, they shall be left with the president or other principal officer, or the secretary, or cashier, or managing agent thereof; and if such corporation is a railroad company, they may be left with any regular ticket or freight agent thereof in any county in which the county is located. (Laws of Ohio, vol. 78, p. 93.) If the garnishee appears and discloses the property in his hands, or the true amount owing by him, and delivers or pays the same according to the order of the court, he will be allowed his costs, and also be discharged from liability therefor to the defendant. If he does not appear, the court may proceed against him by attachment as for a contempt. (R. S., § 5530.)

Attachments are levied in the order of their receipt by the officer, and the lien thereof ranks according to the time of levy. When two or more orders of attachment are received by the officer at the same time they must be levied at the same time, and operate as *pro rata* liens.

There is no joint liability on the respective bonds of one for the acts of any other.

Attachment (OREGON).—The plaintiff, at the time of issuing the summons, or at any time afterwards, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment, in the following cases: 1. In an action upon contract, express or implied, for the direct payment of money, not secured by mortgage, lien, or pledge upon real estate or personal property, or, if so secured, when such security has been rendered nugatory by act of the defendant. 2. In action upon a contract, express or implied, against a defendant not residing in this State.

The clerk of the court must issue the writ of attachment upon receiving an affidavit, by or on behalf of the plaintiff, showing: 1st. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal set-offs or counter claims) upon a contract, express or implied, for the direct payment of money, and that the payment of the same has not been secured by any mortgage, lien, or pledge, upon real or personal property; or, 2d. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness as near as may be over and above all legal set-offs or counter claims), and that the defendant is a non-resident of the State; and, 3d. That the sum for which the attachment is asked is an actual *bona fide* existing debt, due and owing from the defendant to the plaintiff, and that the attachment is not sought, and the action prosecuted, to hinder, delay, or defraud any creditors of the defendant.

Upon filing the affidavit with the clerk, the plaintiff shall be entitled to have the writ issue as soon thereafter as he shall file with the clerk his under-

taking, with one or more sureties, in a sum not less than one hundred dollars, and equal to the amount for which the plaintiff demands judgment, and to the effect that the plaintiff will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the attachment, if the same be wrongful or without sufficient cause, not exceeding the sum specified in the undertaking. With the undertaking the plaintiff shall also file the affidavits of the sureties, from which affidavits it must appear that such sureties are qualified, and that taken together they are worth double the amount of the sum specified in the undertaking, over all debts and liabilities and property exempt from execution. No person not qualified to become bail upon an arrest is qualified to become surety in an undertaking for an attachment.

The rights or shares which such defendant may have in the stock of any association or corporation, together with the interest or profits thereon, and all property in the estate of such defendant, not exempt from execution, is liable to be attached.

An attachment cannot be had upon a claim not due.

An affidavit for an attachment may be made by the plaintiff, or his agent or attorney.

Sureties on an attachment bond must be householders or freeholders in the State.

Property attached may be returned to the defendant upon his giving a counter undertaking to redeliver or to pay the demand. Unless a general assignment is made for the benefit of creditors under the State law, before judgment is rendered on attachment, attaching creditors do not share *pro rata*, but are paid in the order of their attachments.

Attachment (PENNSYLVANIA).—The real and personal property of a non-resident of the State, who is not in the county at the time the writ issues, may be held by a foreign attachment. No affidavit is necessary in the commencement of the action, except where the cause of action arises *ex delicto*. The plaintiff, however, may be compelled to file an affidavit of claim upon the application of the defendant. The sheriff before serving the writ invariably demands security, with one or more sureties sufficient to indemnify him against risk. In Philadelphia the security is approved by the court. (Act of April 10th, 1873.) The defendant may appear, and, by giving adequate security, have the attachment dissolved. By the act of May 8th, 1874, the property of non-residents may be attached for debts less than one hundred dollars on process issued by a justice of the peace. The plaintiff is required to give bond before the attachment can issue, and the defendant may free his property from the attachment by entering security. In either case the security must be for double the amount of the plaintiff's claim. A foreign attachment may be issued at the suit of a non-resident plaintiff. No provision is made for foreign attachment where the plaintiff's claim is not yet matured.

The property of any person, resident or not, may be attached under the act of 1869 upon proof by the affidavit of the plaintiff, or any person for

him, that the defendant is justly indebted to him in a sum exceeding one hundred dollars, setting forth the nature and amount of such indebtedness, and that the defendant is about to remove his property out of the jurisdiction of the court, with intent to defraud his creditors; or that the defendant has property, rights in action, interest in any stock, money, or evidences of debt, which he fraudulently conceals; or that the defendant has assigned, disposed of, or removed, or is about to assign, dispose of, or remove, any such property, rights, stock, etc., with intent to defraud his creditors; or that he fraudulently contracted the debt or incurred the obligation for which such claim is made. Before the attachment issues the plaintiff must file a bond, with sufficient surety, in double the amount claimed, conditioned for the payment of all costs and damages which the defendant may sustain by reason of the attachment, if the plaintiff fail to recover judgment against him. The bond must be approved by the prothonotary or one of the judges of the court of Common Pleas. The defendant may have the property so attached by giving bond in double the amount claimed, with sufficient surety, to be approved by the court from which the attachment issues, conditioned for the payment of the debt and costs, or for the return of the property in as good condition as when attached, if judgment be obtained against him. He may also apply at any time to the court, to hear the evidence and determine the truth of the allegations in the affidavit on which the attachment issued, and the court may dissolve or continue the attachment. The affidavit for this writ of attachment is sufficient if made in the words of the act without charging specific acts of fraud (*Sharpless v. Zeigler*, 11 *Norris*, 467); but if made in this form, the burden of proof rests upon the plaintiff to show the facts upon which he relies by depositions, if the defendant denies the fraud by affidavit and moves to have the attachment dissolved or quashed. (*Matthews v. Dalsheimer*, 10 *Weekly Notes*, 371; *Bradley v. Harker*, 15 *Weekly Notes*, 402.) Giving a check on a bank without having funds to meet it is sufficient evidence of fraud to sustain an attachment. (*Bank v. Wilson*, 12 *Weekly Notes*, 336.) So also the failure by a bank to remit proceeds of a draft collected where it was sent with instructions to remit immediately upon collection. (*Mechanics' Bank v. Miners' Bank*, 13 *Weekly Notes*, 236; 15 *Ib.*, 337.) The attachment may issue against a corporation except as to real estate. (*Mechanics' Bank v. Miners' Bank*, 13 *Weekly Notes*, 515.) Where the plaintiff's claim is not matured the attachment cannot be sustained (11 *Weekly Notes*, 271), and a defendant's interest in a partnership limited cannot be attached. (*Wetherald v. Shupe*, 15 *Weekly Notes*, 366.)

An attachment in the nature of an execution may issue after judgment has been recovered to attach any money or property of the defendant in the hands of third persons, any stock in corporations or other chose in action owned by him, or any debts due to him. Interrogatories are filed which the garnishee must answer, and if there is a dispute of fact an issue between the plaintiff and the garnishee may be tried by a jury.

Attachment (RHODE ISLAND).—In any civil action the original writ may be served by attachment of real or personal estate, or of both, whether the defendants therein named be within or without this State at the time of such service. Real estate, however, cannot be attached upon any justice's writ. But no attachment can be made in any tort action.

No attachment of property can be made upon mesne process, unless an affidavit of the plaintiff, or his agent or attorney, shall be indorsed on the writ, setting forth that the plaintiff has just claim against the defendant, which is due, and upon which he expects to recover in said action a sum sufficient to give jurisdiction thereof to the court to which said writ is made returnable, and also, either that the defendant is an incorporated company established out of the State, or that he resides out of the State, or that he has left the State and is not expected to return in season to be served with process before the next term of the court; or that the defendant, or one of the defendants, has committed fraud in contracting the debt in suit, or in the concealment of his property, or in the disposition thereof; or that since contracting the debt the defendant has been the owner of property, or in receipt of income which he has refused or neglected to apply in payment thereof, though requested by the plaintiff so to do. (Pub. Stats., ch. 206.) Attachments cannot issue upon a debt not matured. Before making attachments, a bond with two or more sureties for the protection of the officer serving may be required in double the value of the property attached.

Each attachment is for the sole benefit of the creditor making it. If set aside by an assignment the costs of making the attachment are to be paid by the assignee, if assets are sufficient. If the attaching creditor is required to give bond to the sheriff before making attachment, in case the suit fails, or the property does not belong to the debtor, the liability is for return of the property (or payment of its value), and damages thereto, if any, with interest; in other words, full indemnity must be made.

All executions run against the goods and chattels and real estate of the defendant, and in cases mentioned under the title of *Arrests* may run also against "the body of the defendant." (Pub. Stats., ch. 222.)

Attachment (SOUTH CAROLINA).—At the time of the issuing of the summons, or at any time afterwards, an attachment may issue in the following cases, to wit: In any action arising for the recovery of money, or for the recovery of property, whether real or personal, and damages for the wrongful conversion and detention of personal property, or in actions for the recovery of damages for injuries done either to person or property (A. A., 1879), against a corporation created by or under the laws of any other State, government, or country, or against a defendant who is not a resident of this State, or against a defendant who has absconded or concealed himself, or whenever any person or corporation is about to remove any of his or its property from this State, or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, any of his or its property, with intent to defraud creditors. The proceedings in cases of attachment are prescribed

by the Code. Before the attachment can issue, the plaintiff must be required to put in an undertaking of at least two hundred and fifty dollars in the court of Common Pleas, or twenty-five dollars in courts of trial justice, with sufficient surety, to pay all costs which may be awarded to the defendant, and all damages he may sustain by reason of the attachment. Sureties need not be freeholders, but can be made to justify. The Code does not require an affidavit of the plaintiff; it only requires an affidavit. It would seem that any one could make it. The affidavit must show a cause of action, the amount of claim, and the proceeds thereof, and that defendant is either a foreign corporation or a non-resident, or has departed from the State, or conceals himself with intent to defraud his creditors, or to avoid service of summons, or has removed, or is about to remove, or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete his property with intent to defraud his creditors. The facts which sustain the belief expressed in the affidavit must be stated clearly so that the officer granting the attachment can say whether or not they support the charge. Whether a non-resident of the State can obtain an attachment against another non-resident has never been decided in this State. The terms of the act make no exception. The jurisdiction is based on the absence or on the acts of the defendant. Yet the question has been doubted. Attachment will lie for a debt not due if fraud can be shown in evading the debt (A. A. 1883). An attachment is a lien subject to all prior liens, and binds the real estate attached from the date of lodgment. Successive attachments take rank according to day of lodgment; provided that all attachments lodged upon the same day shall take rank together. An attachment will not lose its lien if the debtor makes a general assignment, or an assignment under our insolvent laws after it be levied.

Attachment (TENNESSEE).—The proceeding of attachment, *original* and *ancillary*, as practiced in the courts of law and equity, is a remedy of great vigor and efficacy for the enforcement of debts or contracts.

When cause exists, the property of the debtor, of every description, may be seized by attachment at the beginning of the suit, or at any time in its progress, by ancillary attachment, and held to answer the final judgment or decree.

Subsequent attaching creditors do not share *pro rata* with the first attaching creditors.

Property of the debtor of every kind, legal or equitable, choses in action, stocks, etc., may be attached by bill in chancery and held to abide the result of the suit.

Property wherein the debtor has the *legal* title, and which is corporeal or tangible, may be seized by attachment in the courts of law and held to abide the result of the suit.

Demands on such attachments may be prosecuted. Any person having any debt or demand due at the commencement of an action, or a plaintiff after action for any cause has been brought, may sue out an attachment.

(Code, § 3455.) But *cause* for such attachment must exist, and be laid as the foundation of the proceeding.

Causes of Attachment are: 1. Where the debtor resides out of the State. 2. Where he is about to remove or has removed his property out of the State. 3. Where he has removed or is removing himself out of the county privately. 4. Where he conceals himself so that the ordinary process of law cannot be served on him. 5. Where he absconds or is absconding, or concealing himself or property. 6. Where he has fraudulently disposed of or is about fraudulently to dispose of his property. 7. Where any person liable for any debt or demand, residing out of the State, dies, leaving property in the State. (Code, § 3455.) 8. And against a defendant residing in the county as to whom the summons has been returned, "not to be found in my county." (Code, § 3466.) When any cause or ground exists other than the non-residence of the debtor, the attachment may be had though the debt or demand be not due (Code, § 3456); and may be had by an accommodation indorser or surety of the debtor on paper due or not due, as well as by a creditor. (Code, § 3457.)

Preliminary to the issuance of the writ the existence of the cause of the attachment must be shown by the oath of the creditor or his attorney or agent; and he must give bond, with one or more solvent sureties, in double the amount of the debt; or he must take the oath prescribed for poor persons. The sureties need not own real estate; but the clerk or other officer, taking the bond, must be satisfied that the sureties have ample property, unincumbered, out of which the amount of the penalty of the bond could be made by writ of *fi. fa.* The defendant may abate the writ and discharge the attachment by proper pleading, and proof traversing the existence of the cause, or the ownership by the defendant of the property attached. A non-resident creditor may sue out an attachment against the estate of his non-resident debtor, and even for the cause that his debtor *is* a non-resident; provided that where they are residents of the same State the creditor must swear that the property of the debtor has been fraudulently removed to this State to evade the process of law in the State of their domicile or residence. If the attaching creditor does not prosecute his attachment successfully, he is liable for damages as follows: 1. Loss to debtor by injuring, detaining, or converting the property attached. 2. Loss by injury to debtor's business, reputation, etc. 3. Punitive damages for wanton abuse of process, or malice in swearing out the attachment.

Attachment (TEXAS).—The judges and clerks of the district and county courts, and justices of the peace, may issue writs of original attachment, returnable to their respective courts, upon the plaintiff, his agent or attorney, making an affidavit in writing stating: 1. That the defendant is justly indebted to the plaintiff and the amount of the demand; and 2. That the defendant is not a resident of the State, or is a foreign corporation, or is acting as such; or 3. That he is about to remove permanently out of the State, and has refused to pay or secure the debt due the plaintiff; or 4. That

he secretes himself, so that the ordinary process of law cannot be served on him; or 5. That he has secreted his property for the purpose of defrauding his creditors; or 6. That he is about to secrete his property for the purpose of defrauding his creditors; or 7. That he is about to remove his property out of the State, without leaving sufficient remaining for the payment of his debts; or 8. That he is about to remove his property, or a part thereof, out of the county where the suit is brought, with intent to defraud his creditors; or 9. That he has disposed of his property, in whole or in part, with intent to defraud his creditors; or 10. That he is about to dispose of his property with intent to defraud his creditors; or 11. That he is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors; or 12. That the debt is due for property obtained under false pretenses. The affidavit shall further state: 1. That the attachment is not sued out for the purpose of injuring or harassing the defendant; and 2. That the plaintiff will probably lose his debt unless such attachment is issued.

The plaintiff must also execute bond with two or more sureties, approved by the officer issuing the writ, payable to the defendant in at least double the amount sworn to be due, conditioned that plaintiff will prosecute his suit to effect and pay all such damages and costs as may be adjudged against him for wrongfully suing out such attachment. There is no requirement that bondsmen be owners of real estate. No such attachment shall issue until the suit has been duly instituted, but it may be issued in a proper case, either at the commencement of the suit or at any time during its progress.

The writ of attachment above provided for may issue, although the plaintiff's debt or demand be not due, and the same proceedings shall be had thereon as in other cases, except that no final judgment shall be rendered against the defendant until such debt or demand shall become due.

The defendant may replevy property attached, on giving a bond with two sureties in double the amount of the plaintiff's debt sued on, or double the value of the property replevied, as estimated by the officer, conditioned for the satisfaction of any judgment against him for the debt or payment of the value of the property replevied, with interest from the date of bond. Subsequent attachments may be levied, but the priority of attachment liens exists as at common law. When a second or subsequent attachment is set aside, the actual injury to the property seized by virtue of such attachment alone would ordinarily be the measure of liability on the bond.

Any person other than the defendant may claim any personal property levied on.

Attachment (УТАН).—At the time of issuing summons, or any time thereafter, the plaintiff may have an attachment in an action on a judgment, or on a contract, express or implied, not secured by mortgage or lien, upon real or personal property situate in this Territory; or, if originally so secured, such security has, without any act of the plaintiff or of the person to whom the security was given, become valueless; against a defendant non-resident of the Territory; or one who has departed, or is about to

depart, from the Territory, to the injury of his creditors; or stands in defiance of an officer, or conceals himself so that process cannot be served on him; or has assigned, disposed of, or concealed, or is about to assign, dispose of, or conceal any of his property, with intent to defraud his creditors; or has fraudulently contracted the debt or incurred the obligation respecting which the action is brought.

An undertaking must be given with two good sureties in the sum of two hundred dollars at least, and any sum over that equal to the debt sued on, to the effect that if the defendant recover judgment, or if the attachment be wrongfully issued, the plaintiff will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the attachment, not exceeding the penalty of the bond.

The clerk of the court shall issue the writ of attachment on receiving an affidavit by or on behalf of the plaintiff, showing that the defendant is indebted to the plaintiff, specifying the amount thereof, as near as may be, over and above all legal set-offs or counter claims, and whether upon a judgment or an express or implied contract, and that the same has not been secured by any mortgage or lien upon real or personal property, or pledge of personal property, situate or being in this Territory; or, if originally so secured, that such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless; and that the same is an actual, *bona fide*, existing demand, due and owing from the defendant to the plaintiff; and that the attachment is not sought and the action is not prosecuted to hinder, delay, or defraud any creditor of the defendant; and specifying one or more of the causes for attachment set forth above.

After appearance the defendant may have an order to release specific property, upon notice to the plaintiff, and upon filing an undertaking, with two householders as sureties, in such sum as may be fixed by the court or judge, or may also, either before or after such release, or before any attachment shall have been actually levied, upon notice to the plaintiff, have the writ discharged, on the ground that the same was improperly or irregularly issued.

The sureties need not be owners of real estate; but they are required to accompany the undertaking with an affidavit that they are each worth the sum specified in the undertaking, over and above all their just debts and liabilities exclusive of property exempt from execution.

Real and personal property, including debts due the defendant and other choses in action, may be attached. Property and choses in action in the hands of third persons may be attached or garnished.

After appearance the defendant may have an order to discharge the attachment, upon notice to the plaintiff, and upon filing an undertaking, with two householders as sureties in double the amount claimed, or may release specific property by giving an undertaking in double the value of the property sought to be released.

Justices of the peace may issue writs of attachment, in cases within their jurisdiction, upon the same grounds.

Garnishment requires no special affidavit; but debts and credits and other personal property not capable of manual delivery may be garnished in attachment by the officer who holds the writ of attachment leaving with the person owing such debts or having such personal property, or with his agent, a copy of the writ of attachment and a notice that the said debts and other personal property are attached in pursuance of said writ. The officer must serve such copy of the writ and notice on any person, firm, or corporation, within his bailiwick when requested in writing so to do by the plaintiff. A writ of attachment cannot be obtained on a claim not due.

Attachment (VERMONT).—Attachment of property is allowable on mesne process without affidavit or bond, and is to be made when, or before, the writ is served on the defendant. Warrants of attachment cannot be obtained when the debt is not yet due. Real estate is attached by leaving a copy of the attachment in the town clerk's office, and personal property may be attached in the same way, followed by notice forthwith to the defendant; but the officer may take the property into his custody whenever its care, safety, or preservation so requires. Personal property, with the above exceptions, must be taken in actual custody by the officer at the time of attachment. To preserve the attachment lien personal property must be taken on execution within thirty days, and real estate within five months from the date of the judgment. Prior attachments are not affected by an assignment. Attachments have priority of lien in the order of their date, except that an attachment by a director of a private corporation of its property is postponed to a subsequent attachment thereof by a creditor, not a director, made before the first attachment should be returned; and also except that if a person or company is compelled to stop business by reason of attachments on mesne process and does not resume business within thirty days, and is indebted to an employee, an attachment by such employee of the same property takes precedence over such prior attachments to an amount not exceeding fifty dollars, if made before sale thereof on execution.

Attachment (VIRGINIA).—The classes of persons who may be proceeded against by attachment, besides tenants liable for rent, are: 1. Non-residents having estate within the State, or who are sued with defendants residing in the State. 2. Defendants removing, intending to remove, or who have removed their effects out of the State, so that judgment or decree against them would be unavailing.

Non-residents may be sued by attachment in an action at law for debt, or damages for breach of contract, or in equity upon any such claim, or in a suit for specific performance when a certain sum is claimed.

The second class of defendants, removing or intending to remove, etc., may be proceeded against by attachment in any action at law to recover specific personal property, or money upon any claim, or damages for any wrong, that is, including torts.

Against defendant's removing effects, etc., any justice of the peace may

issue an attachment, whether the claim be due or not. In all other cases the writ must be obtained from a clerk of the court, if the claim exceed twenty dollars exclusive of interest. If of twenty dollars or under, exclusive of interest, the attachment should be before a justice of the peace, and not before a court. (Code, 1873, ch. 148, § 29.) A justice of the peace issuing an attachment may, in certain cases, appoint a special constable to execute it. (Sess. Acts, 1878-79, p. 252.)

A non-resident may sue out an attachment against another non-resident when he has estate in the State.

As to attachments against masters of steamboats for materials furnished, see Sess. Acts, 1876-77, p. 37.

Attachments have priority of lien in the order of their date.

Attachments may be levied upon any estate, real or personal, of the defendant. They are sufficiently levied in every case by the service of a copy of the attachment on such persons as may be designated by the plaintiff in writing, or be known to the officer to be in possession of effects of, or to be indebted to, the defendant; and as to real estate, by such estate being mentioned and described by indorsement on the attachment.

Attachments first served on the same property, or on the person having such property in possession, have priority of lien—in the order of their being served. (See Code, 1873, ch. 148, § 26.) The lien of attachment on real estate, described in an indorsement on the attachment, is from the suing out of the attachment. (Code, 1873, ch. 148, § 12.)

Attachment (WASHINGTON TERRITORY).—The plaintiff at the time of issuing the summons and certified copy of the complaint, or at any time afterward, may have the property of the defendant attached, as security for the payment of any judgment he may recover. No exception is made against non-resident plaintiffs.

The writ may issue whenever the plaintiff, or any one in his behalf, shall make and file an affidavit that a cause of action exists against the defendant, and the grounds thereof, and that the defendant is indebted thereon to the plaintiff, specifying the amount over and above all set-offs and counter claims, and that it is not secured by any mortgage, lien, or pledge upon or of property, or if so secured originally, that the security has become inadequate through no act of the plaintiff. (R. C., § 175.)

Upon filing the affidavit with the clerk the writ may issue, or as soon thereafter as the plaintiff executes and files a bond with two sufficient sureties, in a sum not less than two hundred dollars, and equal to the amount for which plaintiff claims judgment, conditioned that the plaintiff will pay all damages defendant may sustain by reason of the attachment, if the same be wrongfully, oppressively, or maliciously sued out; and in an action upon said bond exemplary damages may be recovered, including attorneys' fees and damages for depreciation of property and injury to business and commercial credit, not exceeding amount of bond. (Section 176, as amended.) The sureties shall justify as in proceedings in arrest. (R. C., § 176.)

The right or shares which such defendant may have in the stock of any

association or corporation, together with all the property of defendant subject to execution in this Territory, may be attached, and his debtors may be garnished. (R. C., §§ 179, 186.)

Attaching creditors are paid in the order, as to time, of the levy of their attachments. When several are issued and levied at the same time their claims are paid *pro rata*.

If attachment is set aside the measure of responsibility is actual damages sustained, and costs to an amount not exceeding the bond.

Attachment (WEST VIRGINIA).—The plaintiff may have an order of attachment against the property of the defendant on filing with the clerk of the court an affidavit stating the nature of his claim, the amount at the least which the affiant believes the plaintiff is justly entitled to recover in the action, and also that the affiant believes that some one or more of the following grounds exist for such attachment: That the defendant, or one of the defendants, is a foreign corporation, or is a non-resident of this State; has left or is about to leave this State, with intent to defraud his creditors; so conceals himself that a summons cannot be served upon him; is removing or is about to remove his property, or a part thereof, out of the State, with intent to defraud his creditors; is converting, or is about to convert his property, or a material part thereof, into money or securities, with intent to defraud his creditors; has assigned or disposed of his property, or a material part thereof, or is about to do so, with intent to defraud his creditors; has property or rights in action which he conceals; has fraudulently contracted the debt, or incurred the liability for which the action or suit is about to be or is brought. Unless the attachment is sued out upon the ground that the defendant is a non-resident or foreign corporation, the affiant must state in his affidavit the material facts relied on by him to show the existence of the grounds upon which his application for the attachment is based. The affidavit may be made by the plaintiff, or any credible person whatever. Upon giving bond and security the sheriff is required to take the attached property into his possession. The bond must be in a penalty of at least double the amount of the claim sworn to or sued for, with condition to pay all costs and damages which may be awarded against the plaintiff, or sustained by any person, by reason of the suing out of the attachment, and to pay to any claimant of any property seized or sold under or by virtue of said attachment all damages which he may recover in consequence of such seizure or sale, and also to warrant and defend to any purchaser of the property such estate or interest therein as is sold. The only provision of law as to the security in such bond is that the security shall be good, and approved by the clerk issuing the attachment. (Acts of 1882, ch. 158.)

An attachment may be sued out in a court of equity for a debt or claim, legal or equitable, whether due or not, upon any of the grounds aforesaid, but the affidavit, in case the debt or claim be not due, must show when it will become due. Provided that an attachment shall not be sued out against a foreign corporation or a non-resident defendant, for a debt not due, upon the ground alone that the defendant is a foreign corporation or a non-resi-

dent, nor against a non-resident defendant for a debt not due unless the affiant shows by his affidavit that he was a resident of this State when the debt was contracted, and that the plaintiff believed he would remain a resident of this State at the time he gave him credit. (Acts of 1885, ch. 38.)

A non-resident of the State can obtain an attachment against the property of another non-resident on the ground of the latter's non-residence, even though both parties reside in the same State.

In an action before a justice an attachment can be issued on the plaintiff giving a bond in double the amount of the claim, and filing an affidavit showing the nature of the claim, that it is just, the amount thereof as near as may be, that the defendant has committed or is about to commit fraud in one or more of the particulars mentioned in relation to orders of arrest made by justices, or has absconded, left his residence, or concealed himself with intent to hinder or defraud any creditor, or avoid service of process, or that the defendant or any of the defendants is a foreign corporation or a non resident of the State.

Attaching creditors do not share *pro rata*, unless the attachments are all levied or served at the same time, but they are entitled to satisfaction in the order of the levies or services of their attachments. When two or more attachments are delivered to the same officer at different times, to be served, he shall serve them in the order in which he receives them; and when they are received at the same time, they shall be served at the same time, and be satisfied *pro rata*.

The attaching creditor and securities upon the bond given at the issuance of the attachment are liable to the damages, etc., stated in the condition of the bond to the extent of the penal sum therein named. The attaching creditor himself, however, is liable for the damages occasioned to defendant by an attachment sued out without sufficient cause, or improperly, although in excess of such penal sum, and the amount thereof may be assessed by a jury, there being no arbitrary amount of such damages fixed by statute.

Attachment (WISCONSIN).—Any creditor may procure a writ of attachment against the property of the debtor, whether a natural person or a corporation, except a municipal corporation. The writ of attachment is issued by the clerk of the court at any time after the issuing of a summons in the action before final judgment. Before the issuing of the writ of attachment the plaintiff, or some one in his behalf who has knowledge of the facts required to be stated, shall make an affidavit stating that the defendant named is indebted to the plaintiff in a sum exceeding fifty dollars, and specifying the amount of such indebtedness as near as may be, over and above all legal offsets, and that the sum is due upon a contract, express or implied, or upon a judgment or decree, and containing a further statement that deponent knows, or has good reason to believe, either: 1. That the defendant has absconded or is about to abscond from the State, or is concealed therein to the injury of his creditors, or keeps himself concealed therein with intent to avoid the service of a summons. 2. That the defendant has assigned, conveyed, disposed of, or concealed, or is about to assign, convey, dispose

of, or conceal his property, or any part thereof, with intent to defraud his creditors. 3. That the defendant has removed, or is about to remove any of his property out of the State, with intent to defraud his creditors. 4. That the defendant fraudulently contracted the debt or incurred the obligation respecting which the action is brought. 5. That the defendant is not a resident of the State. 6. That the defendant is a foreign corporation; or if created under the laws of this State, that all the proper officers thereof on whom to serve the summons do not exist, are non-residents of the State, or cannot be found. 7. That the action is brought against the defendant as principal on an official bond to recover money due the State or some county or other municipality therein, or that the action is brought against the defendant as principal on a bond or other instrument given as evidence of indebtedness for, or to secure the payment of money embezzled or misapplied by such defendant whilst acting as an officer of the State or of any municipality therein. Or the affidavit shall state that a cause of action sounding in tort exists in favor of the plaintiff against the defendant; that the damages sustained and claimed exceed the sum of fifty dollars, specifying the amount claimed, and a further statement, either: 1. That the defendant, or any of the defendants, is not or are not residents of this State, or that his or their residence is unknown and cannot with due diligence be ascertained; or 2. That the defendant is a foreign corporation. A writ of attachment may be issued on a demand not yet due in any case mentioned under the first four subdivisions, but the affidavit must state that the debt is to become due.

If the affidavit for a writ of attachment be made by any person on behalf of the plaintiff, it must state that it is made on behalf of the plaintiff, and also the relation of deponent to plaintiff, and unless he states that he knows the facts, it must give his grounds of information or belief. (*Anderson v. Wehe*, 58 Wis., 615.) An affidavit for attachment may be amended before the trial.

Before the writ of attachment shall be executed, a written undertaking on the part of the plaintiff, with sufficient surety,—which, when the attachment is on a debt due, shall not be less than two hundred and fifty dollars, but when the attachment is on a debt not due must be three times the amount demanded,—shall be delivered to the officer to the effect that, if the defendant recover judgment the plaintiff shall pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the writ. The surety shall justify his responsibility by affidavit annexed to the undertaking, setting forth that he is a resident and householder or freeholder within the State, and is worth the sum specified in the undertaking, in property within the State, over and above all his debts and exclusive of all property exempt from execution. The defendant may apply to a judge of the court on five days notice for additional security, and the judge may require another undertaking in such sum as he shall deem proper, not exceeding the appraised value of the attached property. Alias writs of attachment may be issued in the same action to the sheriffs of different counties.

Personal property is attached by the officer by seizure; real estate, by filing in the office of the register of deeds a copy of the writ of attachment, with his certificate indorsed thereon, that by virtue of the original writ, of which such copy is a true copy, he has attached such real estate or all the interest of the defendant therein, describing the same with convenient certainty as the property of a defendant, naming him, in such writ. The sheriff, when there is any reasonable doubt as to the ownership of the property, may require sufficient security to indemnify him. If the property attached shall be likely to perish or depreciate in value before the probable end of the action, or the keeping thereof shall be attended with much loss or expense, the judge may order the same to be sold and the proceeds will be held by the officer in lieu of the property sold. The defendant can secure a release of the property attached by delivering to the officer having the writ an undertaking executed at least by two sureties, to the effect that they will on demand pay to the plaintiff the amount of the judgment with all costs that may be recovered against such defendant in the action, with interest, in a sum at least double the amount alleged to be due in the affidavit annexed to the writ, or, at defendant's option, at least double the appraised value of the attached property; or if real estate, in a sum to be fixed by the order of the judge. The defendant may traverse the affidavit for attachment by a special answer within ten days after notice of the issue of the writ, or within the time in which he may answer the complaint in the action, denying the existence of any or all the material facts stated therein, except the liability. The issue so raised is tried by the court before the trial of the action, and the affirmative thereon is upon the plaintiff. If the court on the trial of such issue find for the defendant, and the attachment was on a debt not due, the action will be dismissed with costs; but if the attachment was on a debt due, an order will be entered that the attached property be delivered up to the defendant with costs; and then, upon the trial of the action, the jury must assess the damages sustained by the defendant by reason of the injury caused by the attachment, which amount shall be applied as a set-off to the plaintiff's demand; and if in excess of it, the defendant may recover the amount of such excess. If the action be dismissed, or the defendant shall recover judgment, the jury shall specially assess the defendant's damages by reason of the attachment. Creditors attaching do not share *pro rata*, but according to their priority. Attachments may be issued from justice courts on similar conditions and in a similar manner, but no bond is required.

Attachment (WYOMING).—The plaintiff in a civil action for the recovery of money may at or after the commencement thereof have an attachment against the property of the defendant, and upon the following grounds: 1. When the defendant, or one of the defendants, is a foreign corporation or a non-resident of the Territory. 2. Has absconded with intent to defraud his creditors. 3. Has left the county of his residence to avoid the service of summons. 4. So conceals himself that a summons cannot be served on him. 5. Is about to remove his property or a part thereof out of the jurisdiction of the court, with the intent to defraud his creditors. 6. Is about to convert

his property, or a part thereof, into money for the purpose of placing it beyond the reach of his creditors. 7. Has property or rights in action which he conceals. 8. Has assigned, removed, or disposed of, or is about to dispose of his property, or a part thereof, with the intent to defraud his creditors. 9. Fraudulently contracted the debt or incurred the obligation. 10. In all cases not exceeding two hundred and fifty dollars in which the debt is not otherwise secured, and which has not been paid when due and within ten days thereafter on demand.

To obtain the writ of attachment the affidavit of the plaintiff, his agent or attorney, must be filed, showing one or more of the above grounds and the nature of the claim; that it is just, and the amount which the affiant believes the plaintiff ought to recover. The plaintiff before obtaining the writ must also execute an undertaking to the defendant with one or more sufficient sureties in an amount not exceeding double the plaintiff's claim, to the effect that the plaintiff will pay the defendant all damages which he may sustain by reason of the attachment if the order be wrongfully obtained.

After the writ is issued it is levied upon any property of the defendant not exempt from attachment. Moneys and credits in the hands of any person may also be garnished under the writ.

Sureties on undertakings in attachment need not be owners of real estate, but must satisfy the clerk of the court by affidavit or otherwise that they are sufficient.

Attachment may issue upon claims not yet due, in the event of affidavits showing existence of any or the grounds from second to ninth inclusive.

BANKS AND BANKING.

National Bank Powers.—Purchase of Draft With Bill of Lading Attached.—H. B. & Co., of Chicago, shipped a lot of bran and oats to L. & L., Columbia, S. C., drawing for the price, as follows:

“\$270.66.

CHICAGO, Dec. 3, 1883.

At sight, New York Exchange, pay to the order of J. P. Odell, Cashier, Two hundred and seventy $\frac{66}{100}$ dollars, value received, and charge to account of Lorick & Laurence, Columbia, S. C. HORD BROS. & Co.”

The Union National Bank purchased or discounted this draft, with bill of lading attached, and sent it to L. & L. for acceptance, which was refused. When the bran and oats reached Columbia they were attached by L. & L. on a debt claimed to be due them by H. B. & Co., on account of previous transactions. The Union National Bank thereupon brought an action against the sheriff to recover possession

of the property. The defense was that the bank had bought the draft, and such a purchase was beyond the power of a national bank, and gave it no title. The Supreme Court answered, that as a national bank is expressly authorized by the act of Congress to buy and sell exchange, there cannot be a doubt that the plaintiff had a right to purchase these papers, called drafts, as they were in fact bills of exchange, and hence it was wholly immaterial to inquire whether the plaintiff bought or discounted them. (*Union National Bank v. Rowan*, 23 S. C., 339.)

Private Information of Director.—Bank not Affected.—Position of Directors as Agents of Bank.—The knowledge of a single director, not communicated to the bank officers, of some infirmity in paper discounted, giving the maker a defense, is not sufficient to take away the standing of the bank as a *bona fide* holder without notice of the defect.

Thus, a note obtained of the maker by fraud, and held by the firm of M. & J. S. P., was offered by P., a member of the firm, for discount at the bank of which he was a director. P. had notice of the maker's defense, but did not communicate his knowledge to any of the bank officers. The bank having discounted the note, the maker set up his plea of fraud, but it was disallowed by the Supreme Court of New Jersey; the court said—"The inquiry is, under what circumstances directors of a corporation are its agents for the purpose of receiving notice. The directors of a corporation are not individually its agents for the transaction of its ordinary business, which is usually delegated to its executive officers, such as the president or cashier. Directors are possessed of extensive powers, even to the extent of absolute control over the management of its affairs; but these powers reside in them as a board; and, when acting as a board, they are collectively the representatives of the corporation. Notice to directors, when assembled as a board, would undoubtedly be notice to the corporation. Under what conditions knowledge acquired by a director in other than his official capacity will be constructive notice to the corporation, and be binding on it, is not entirely settled in the cases. A distinction has been taken

between knowledge of illegality or want of consideration of a note by a director who acts with the board in discounting it, and such knowledge on the part of a director who is not present and acting with the board when the discount is made. In the former case it has been held that the bank is bound by his knowledge; in the latter it is not. * * * It will not be necessary to consider the soundness of this distinction, for it is admitted that Perrine's knowledge of the infirmity in the consideration of this note was acquired when he was acting in his private capacity; and the opening of counsel did not propose to show that he was present at the bank when the note was discounted, and participated as a director in the act of discount." (First National Bank v. Christopher, 11 Vroom.)

Certification.—Power of Assistant Teller to Certify.—Evidence of Authorization.—The Supreme Court thinks it a grave question whether a usage to infer authority to certify checks as a generally recognized incident of the office of teller or assistant teller, is not essentially bad, "for the reason that it is in effect a power to pledge the credit of the bank to its customers." In the case before the court, Blair was assistant teller of the "Nation Trust Company," a banking institution, and had certified as "good," the check of a drawer who had not at the time on deposit sufficient funds for its payment. Blair testified that he was in the employ of the company as assistant teller, and in that capacity certified the check in suit, not only under a general authority from the cashier to do so, but his impression was that the cashier specially directed him to certify that particular check. As to the fact of general authority to certify, by knowledge, acquiescence and notification of the company, he was corroborated by an officer of the German National Bank, who testified in substance that between dates named he had seen quite a number of checks bearing the certificate of Blair, as assistant teller; that these checks came into the possession of his bank through the clearing house, and were duly honored by the Nation Trust Company. There was some other testimony of a similar tendency, and the Court said that the whole was quite sufficient

to carry the case to the jury on the authority of the assistant teller to certify. The Court also expressed the opinion that "if his authority, as between himself and his principals, was in fact restricted to cases in which the drawer had sufficient funds, and he, either intentionally or by mistake, transcended that authority by marking the check 'good' when the drawer thereof had no funds, the consequences of his infidelity or blunder should be visited, not upon the innocent holder of the check so certified, but upon the agent's employers, who put it in his power to commit the wrong." (Hill v. Trust Co., 108 Pa. St., 1.)

Acceptance and Certification.—A bank is not bound to certify a check. Certification is an act of courtesy, but at the same time is an act which the customers of banks have come to expect as a matter of course. "The practice of certifying checks," says an eminent authority (Mr. Justice Swayne of the United States Supreme Court,) "has grown out of the business needs of the country. They enable the holder to keep or convey the amount specified with safety. They enable persons not well acquainted to deal promptly with each other, and they avoid the delay and risks of receiving, counting and passing from hand to hand large sums of money. We could hardly inflict a severer blow upon the commerce and business of the country than by throwing a doubt upon their validity." So much for their convenience and value to the public. The same authority, undertaking to look at them from the banker's point of view, makes these assurances of their safety, at the same time marking out the proper course of practice regarding them. "A bank incurs no greater risk in certifying a check than in giving a certificate of deposit. In well regulated banks the practice is at once to charge the check to the account of the drawer, to credit it in 'a certified check account,' and when the check is paid to debit that account with the amount. Nothing can be simpler or safer than this process."

These citations are from an opinion delivered in the United States Supreme Court, where also the legal effect or consequence of certification is stated as follows:

“By the law merchant of this country, the certificate of the bank that a check is good is equivalent to acceptance. It implies that the check is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. It is an undertaking that the check is good then and shall continue good, and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume.” (*Merchants Nat. Bank v. State Nat. Bank*, 10 Wall., 604.)

Power of Cashier to Certify.—The question in the case above cited upon checks for \$600,000 drawn by Mellen, Ward & Co., of Boston, and certified by the cashier of the State National Bank, in payment for gold bought of the Merchants National Bank. Mellen, Ward & Co. having failed, payment of the checks was demanded from the certifying bank. The president denied the power of the cashier to certify them, and resisted payment. The court said that the question whether his authority was not fairly inferable from the facts involved should have been left to the jury. The following general principles on the same point were laid down, and are of sufficient interest to repeat at some length:

“The organic law expressly allowed the bank to buy coin and bullion. We have also adverted to the provisions of the by-laws, that the cashier shall be responsible ‘for the moneys, funds, and all other valuables of the bank;’ and that ‘all contracts, checks, drafts, receipts, etc., shall be signed either by the cashier or president.’ The power of the bank to certify checks has been sufficiently examined. The question we are now considering is the authority of the cashier. It is his duty to receive all the funds which come into the bank, and to enter them upon its books. The authority to receive implies and carries with it authority to give certificates of deposit and other proper vouchers. Where the money is in the bank he has the same authority to certify a check to be good, and charge the amount to the drawer, appropriate it to the payment of the check, and make the proper entry in the books.

of the bank. This he is authorized to do, *virtute officii*. The cashier is the executive officer, through whom the whole financial operations of the bank are conducted. * * * Tellers and other subordinate officers may be appointed, but they are under his direction, and are, as it were, the arms by which designated portions of various functions are discharged. A teller may be clothed with the power to certify checks, but this in itself would not affect the rights of the cashier to do the same thing. The directors may limit his authority as they deem proper, but this would not affect those to whom the limitation was unknown. * * * Those dealing with a bank in good faith have a right to presume integrity on the part of its officers, when acting within the apparent sphere of their duties, and the bank is bound accordingly."

Certification not Made at Banking House.—The checks of Mellen, Ward & Co., in the case cited *supra*, (page 174,) were certified by the cashier of the State National in the banking house of the Merchants, where he went with a representative of Mellen, Ward & Co., to get the gold. The court said on this point—"It is objected that the checks were not certified by the cashier at his banking house. The provisions of the Act of Congress as to the place of business of the banks created under it must be construed reasonably. The business of every bank, away from its office—frequently large and important—is unavoidably done at the proper place by the cashier in person or by correspondents or other agents. In the case before us, the gold must necessarily have been bought, if at all, at the buying or the selling bank, or at some third locality. The power to pay was vital to the power to buy, and inseparable from it. There is no force in this objection." (*Merchants Nat. Bank v. State Nat. Bank*, 10 Wall., 604.)

Certification.—Acts of Congress.—The Act of Congress, of March 3, 1869, makes it unlawful for any officer of a bank to certify a check unless the drawer has funds on deposit, at the time, equal to the amount specified in such check. This prohibition does not apply to a verbal promise on the part of a national bank to pay a check drawn upon it, in a certain contingency by which the bank expects to be provided with

the funds then wanting. A check drawn by Quarrier, treasurer of the Wheeling Institution for Savings, on the First National Bank of Wheeling, was presented to the drawee bank for acceptance. The latter had no money of the drawer in possession, but held "for collection" its draft to a larger amount than the check called for. The promise was made that as soon as information was received that this draft was paid, the bank would pay the check. The check remaining unpaid, the holder, the Merchants National Bank, sued the First National on its verbal acceptance. The latter contended that it was not bound, because, among other reasons, the acceptance was not in writing. This argument the Supreme Court rejected as unsound, saying—"We assume here, without argument, that it is sufficiently established, by both English and American authorities, that the conditional acceptance of a check, as also the oral acceptance of a check, or the oral promise to pay a check, are valid and can be maintained. Because the bank must not in writing certify a check when there are no funds of the drawer in its possession, therefore it shall not verbally agree to pay a check when there are funds in possession sufficient for the purpose; for this, at least, is implied in such an argument. This would seem to be giving a strained and improper effect to the Act of Congress."

Again—"Because the Act of Congress prohibits a bank from certifying a check when the drawer has no funds, why should that invalidate a promise on its part to pay a check when the drawer shall have funds for the purpose in its possession?" (First Nat. Bank v. Merchants Nat. Bank, 7 W. Va., 544.)

Bonds of Bank Officers.—Obligation of Sureties.—Boards of directors of national banks have the right to determine what bonds their officers shall give. The number and sufficiency of the sureties may be reserved for their own determination, or committed by resolution to the president. There need be no written record of the approval or acceptance of the bond. If submitted to the directors and retained by the bank, that is sufficient evidence of its acceptance, if supported by oral testimony.

If a bank cashier has been guilty of fraud or embezzlement,

which ordinary diligence would enable the directors to discover, and if, after such misconduct official statements are published, showing the condition of the bank to be sound, there is the authority of the Kentucky Court of Appeals for saying, that the sureties on the bond of such officer, who went on the bond subsequently to the publication, and presumably, in part, on the strength of it, are discharged from their obligation. (*Graves v. The Lebanon Nat. Bank*, 10 Bush., 23.)

The regular official statements of condition are thus treated as representations, not only that the facts therein stated are true, but, as construed by the court in this instance, that the cashier has been faithful thus far to his trust. This seems to be a somewhat forced conclusion, and the reasoning of the court on this point does not appear to be entirely convincing. The language was, "We have, therefore, a case in which the directory of the bank held out to others as a trustworthy officer a man who had been guilty of repeated embezzlements and frauds, all of which might have been discovered by the exercise of slight diligence. However innocently the publication tending to show that Mitchell (the cashier) was an honest and faithful officer may have been made, the fact remains that the public had the right to act upon the presumption that the three directors attesting the accuracy of the statements contained in the publication had made some investigation at least to inform themselves as to the matters to which it related. The effect of the published report was to inspire the public with confidence in the officers of the bank, to disarm suspicion, and to prevent inquiry. The losses occasioned by the fraudulent appropriations by Mitchell of the bank's money after the acceptance of his bond must fall upon either the association or upon his sureties. The latter are free from blame. They acted in the matter with reasonable prudence and discretion. They relied upon the truth of representations made by those having the right to speak for the bank. These representations have turned out to be untrue. Had the sureties suspected that they were untrue, it cannot be supposed they would have entered into the contract of suretyship. Such being the case, the contract must be adjudged invalid."

If an officer's bond is not dated, except on "the day of 1869," and the date of its delivery cannot be shown, the legal presumption is, that it did not become binding on the sureties until the last day of that year. (Ib.)

Removal of Officers.—The National Bank Act (Section 5136, R. S.,) confers on the board of directors the power to appoint a president, vice-president, cashier and other officers, and dismiss them, or any of them, at pleasure. The president may be removed in the same manner as the other officers. This power is not derived from the articles of association or the by-laws, but is derived directly from the Act of Congress. The question was raised by the stockholders and directors of the Fourth National Bank of New York, who dissented from the action of two-thirds of the board, from removing Mr. George Opdyke from the presidency. Though the articles of association gave the power of removal by a two-thirds vote, the court, in dissolving a preliminary injunction, intimated that the power existed independently of them, and said—"Irrespective of the by-laws and of the articles of association, the board have power, under the act, to remove the president, by a mere majority vote; assuming that they modify and qualify the act a two-thirds vote is required." The dissenting directors and stockholders having urged that the court should stay the proposed removal until an approaching meeting of the stockholders, the court replied, that—"On mere questions of expediency of this character, courts have no power to interfere with the action of a bank or its officers." It was also said to be quite plain, that the directors, and not the stockholders, are the repositories of the power of appointment and removal, and that "it does not seem to be at all necessary that any by-laws should be adopted before a president may be chosen or removed, and another appointed in his place." (Taylor v. Hatton, 43 Barb., 195.)

Without express authority in the Articles of Association, the by-laws, or from the board of directors, the president of a national bank cannot make a binding contract with the cashier, teller, or other officer, for any definite term of employ-

ment. Such a contract would deprive the board of directors of their right to remove the officers at their pleasure.

The teller of the First National Bank of Chittenango, N. Y., was dismissed by the president for disobedience to the orders of the cashier, who was practically in charge, the president being seldom at the bank. The dismissal was in September. The teller claimed that he was employed for a year ending the following April, and brought suit to recover his salary for that period. In the trial court the jury was charged that "there were sufficient grounds for defendant's discharging the plaintiff from their employment, if such grounds had been acted upon when they occurred, or had been stated to the plaintiff when he was discharged." The New York Supreme Court, on appeal, therefore, addressed itself to the consideration of the two questions:

"1st. Whether the dismissal must of necessity be at the time of the occurrence of the misconduct; and

"2d. If it is required by law, that the grounds of the discharge be given at the time the discharge is made."

Both questions were substantially answered in the negative, though it was said that "if the fact of delay had been certain, as the judge assumed, it might perhaps have been proper to submit to the jury whether the delay was not unreasonable, and whether the objection had not been waived or condoned."

Another question was, whether the directors had not ratified the president's contract with the dismissed teller for a year's service. It was claimed that they had done so, by mere acquiescence. The president testified—"I don't think I communicated to any of the directors about the hiring of him;" and that there was "no action of the board of directors in regard to the increase of wages to him." The trial judge charged the jury, however, that the directors "acquiesced in the employment of the plaintiff by their president, if they knew he was acting in their bank as teller or clerk, and made no objection to his serving there at or after the directors had a meeting." But the appellate court replied, that "to make a ratification by the principal of the unauthorized act of an agent good, it must be made with a full knowledge of the

facts which affect the rights of the principal. This main feature of ratification is omitted." The dismissed teller having had a verdict in the court below for the amount of his claim, the appellate court ordered a new trial. (*Harrington v. First Nat. Bk. of Chittenango*, 1 Thompson & Cook, 361.)

Transfer of Stock.—Under the National Banking Act, shares are "transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association." (Section 12, Act of 1864.) This power of regulating transfers, however, is limited by the thirty-fifth section, which provides that no association shall be the purchaser or holder of any shares of its own capital stock, "unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith."

It appears to have been quite a common if not a natural conclusion, that under this power to regulate transfers, the banks might maintain the right to refuse a transfer, so long as the owner of the shares remained indebted to the bank. Such a prohibition was in fact embodied in the act of 1863. A by-law to this effect, indeed, assumes that it must always be necessary in order to prevent loss; and this cannot be true without a general disregard of the spirit, if not the letter, of the requirement "that no associations shall make any loan or discount on the security of the shares of its own capital stock." Nevertheless the courts to some extent, as well as national banking associations, were of the opinion that these institutions could, by means of by-laws, at any rate when authorized by the articles of association, create a lien on the shares of a stockholder indebted to them. * * * The argument was, that though the Act of Congress does not itself create a lien on a debtor's stock (as did the Act of 1863,) it does by the words of its fifth section authorize the creation of such a lien by the articles of association, and by by-laws made under them. This section permitted the articles to "contain any other provisions not inconsistent with the provisions of this Act, which the association may see fit to adopt for the regulation of the business of the association and the conduct of its affairs." The point was finally put at

rest by the Supreme Court of the United States in the case of the Eagle National Bank of Boston, whose articles of association provided that the by-laws might "prohibit, if the directors so determine, the transfer of any stock owned by any stockholder who may be liable to the association, either as principle debtor or otherwise, without the consent of the board." A by-law to this effect was accordingly adopted, and a case arising under it the judges of the United States Circuit Court for the district of Massachusetts were divided in opinion whether it was valid or not. The United States Supreme Court answered the question in the negative. "Surely," said Judge Strong, "when the statute has prohibited all express agreements for a lien in favor of a bank upon the stock of its debtors, there can be no implication of a right to create such a lien from any thing contained in the fifth section." (*Bullard v. Bank*, 18 Wallace, 589.)

Depositor's Pass-Book.—Effect of Entries.—Negligence of Depositor in Examining.—Loss of Remedies.—An instructive lesson with respect to the function of a depositor's pass-book may be gathered from the following narration:

A. & Co., British subjects, had a deposit account with the Leather Manufacturers National Bank of New York City, in the name of "William B. Cooper, agent for Ashburner & Co." One Berlin was C.'s confidential clerk, kept his books, had full charge of his account with the bank, filled up the checks drawn, and entered them upon the stubs. Between September 11, 1880, and February 13, 1881, he filled up certain checks, which, after being signed by his employer and delivered to him, were altered by him and raised in amount before they were taken from the office. According to his own testimony the alterations were made by erasure and rewriting the body of the checks, the work being done with great care, so that the fraud could not be detected without very careful scrutiny, or a very close examination. The teller of the bank testified that the checks when presented by Berlin were always carefully examined by him as to signature, date, amount and indorsement, and that there was nothing about them to excite suspicion, or to suggest alteration or erasure. Upon

the altered checks Berlin received the full raised amount, out of which he paid to C. or to his use, the several amounts for which they were drawn, and embezzled the remainder. The entries in the check-book were made by Berlin and were correct; but he "forced the footings of the stubs" by making false additions equal to the increase of the altered checks. Ashburner & Co. sued the bank to recover the amount paid out and charged to Cooper's account on these forged checks, but Cooper's negligence in discovering the forgeries was decided by the United States Supreme Court to save the bank from liability, and establish the account as stated in the pass-book.

The court drew the following sketch of the functions of a depositor's pass-book, and his duty in regard to its examination:

"It is within common knowledge that the object of a pass-book is to inform the depositor from time to time of the condition of his account as it appears upon the books of the bank. It not only enables him to discover errors to his prejudice, but supplies evidence in his favor in the event of litigation or dispute with the bank. In this way it operates to protect him against the carelessness or fraud of the bank. The sending of his pass-book to be written up and returned with the vouchers, is therefore, in effect, a demand to know what the bank claims to be the state of his account. And the return of the book, with the vouchers, is the answer to that demand, and, in effect, imparts a request by the bank that the depositor will, in a proper time, examine the account so rendered, and either sanction or repudiate it. * * *

"Of course, if the defendant's officers, before paying the altered checks, could by proper care and skill, have detected the forgeries, then it cannot receive a credit for the amount of these checks, even if the depositor omitted all examination of his account. But if by such care and skill they could not have discovered the forgeries, then the only person unconnected with the forgeries who had the means of detecting them was Cooper himself. He admits that by such an examination as that of March, 1881, he could easily have discovered them on the balancings of October 7, 1880, November 19,

1880, and January 18, 1881. If he had discovered that altered checks were embraced in the account, and failed to give due notice thereof to the bank, it could not be doubted that he would have been estopped to dispute the genuineness of the checks in the form in which they were paid." The same principle, the court thought, would apply to his negligence in examining the account and thus discovering the fraud. But it was further said—"We must not be understood as holding that the examination by the depositor of his account must be so close and thorough as to exclude the possibility of any error whatever being overlooked by him. Nor do we mean to hold that the depositor is wanting in proper care, when he imposes upon some competent person the duty of making that examination and of giving timely notice to the bank of objections to the account. If the examination is made by such an agent or clerk in good faith and with ordinary diligence, and due notice given of any error in the account, the depositor discharges his duty to the bank. But when, as in this case, the agent commits the forgeries which misled the bank and injured the depositor, and, therefore, has an interest in concealing the facts, the principal occupies no better position than he would have done had no one been designated by him to make the required examination—without, at least, showing that he exercised reasonable diligence in supervising the conduct of the agent while the latter was discharging the trust committed to him." (*Leather Manufacturers Bank v. Morgan*, 118 U. S., 96.)

The effect of allowing the entries in a pass-book to pass unchallenged, in case of checks paid on forged indorsement of payee's name, was considered by the New York Superior Court, in the case of *Welsh v. German American Bank*. (10 *Jones & Spencer*, 462.) Some twelve checks were in question, the depositor's clerk having by false representations obtained them from his employer, payable to the order of a customer, whose indorsement the clerk had forged. The court said—"There was no other ratification of the payment than the plaintiff not discovering the forgery for some time, at the longest two years, and not making any claim upon defendant until the discovery. Of course," added the court, "whatever

was the legal force of the retaining of the book by the plaintiff under the circumstances, whether it had only the effect of an admission, or was a technical account stated, the plaintiff had the right to show what errors or mistakes affected the result."

Collections through Banks.—Duty and Liability of Bank Receiving Paper for Collection.—Responsibility for Acts and Defaults of Sub-Agent.—It will be interesting, both to bankers and their customers, to review the question how far a bank, which receives bills or drafts for collection, is liable for the mistakes or defaults of a second bank to which the first bank transmits the paper, or of a notary or other agent employed by it in making presentment for acceptance or payment.

It is well known that there have been a series of conflicting decisions on these points in different states. In New York, New Jersey, Pennsylvania, Ohio, and Indiana, the rule has been declared to be, that "a bank, receiving a draft or bill of exchange in one state for collection in another state from a drawee residing there, is liable for neglect of duty occurring in its collection, whether arising from the default of its own officers, or from that of its correspondent in the other state, or an agent employed by such correspondent, in the absence of any express or implied contract varying such liability."

On the other hand, the doctrine that "if a bank acts in good faith in selecting a suitable sub-agent at the place where the bill is payable, it is not liable for his neglect," has been laid down in Massachusetts, Connecticut, Maryland, Illinois, Iowa, Wisconsin, Tennessee, and Missouri.

In the Ohio case, where the rule was applied as above, a second bank was the agent employed, and the second bank was held to be the agent of the first; but in another instance in the same state a notary was employed to make demand and protest, by the bank which first undertook the collection, and the notary in that case was held to be the sub-agent of the bill-owner, and not of the collecting bank.

The distinction was based on the fact that in Ohio, a notary is a public officer, whose duties are prescribed by law; and in a similar case, founded upon the coincident law of Mississippi,

the United States Supreme Court made the same ruling, and said that for any failure of the notary to perform his whole duty he alone was liable; "the bankers were no more liable than they would have been for the unskillfulness of a lawyer of reputed ability and learning to whom they might have handed the notes for collection in the conduct of a suit brought upon them." (*Britton v. Nichols*, 104 U. S., 757.)

But on the primary question stated—the liability of the first bank for the defaults of the second—the United States Supreme Court has lent the great weight of its authority to establish the rule that the first bank is liable. That rule, therefore, must at all events control in all cases arising in the the federal courts; and it has thus acquired such weight as to make it unlikely that the opposite doctrine will spread beyond its present limits in the state courts.

The occasion of the United States Supreme Court decision was a series of drafts made by Rogers & Burchfield, of Pittsburgh, and addressed to the drawee as follows: "To Walter M. Conger, Sec'y Newark Tea Tray Co., Newark, N. J.," They were discounted for the drawers before acceptance by the Exchange National Bank of Pittsburgh, to which they were represented as "the paper of the Newark Tea Tray Company," drawn against shipments of iron by the drawers. One of the latter also represented to the Pittsburgh bank that "Walter M. Conger was the person who examined the shipments of iron and accepted the drafts, and that they were drawn in this form for the convenience and accommodation of the company. The drafts were sent by the Pittsburgh bank "for collection" to the Third National Bank of New York, and by the latter bank sent to its correspondent, the First National Bank of Newark for acceptance. In sending them to the Newark bank the New York bank described the drafts, eleven in number, and running four months, by their numbers and amounts, and all but two also by the words "Newark Tea Tray Co." The other two were drawn on "W. M. Conger, Sec'y." The drafts were received by the New York bank within a day or two after they were discounted. While they were in the hands of the Newark bank awaiting acceptance, Conger informed the cashier that he would not accept them in his official

capacity as secretary, and all but one of the drafts were accepted by writing across the face these words: "Accepted, payable at the Newark National Banking Co. Walter M. Conger." There was of course ample time for the Newark bank to have notified the owner of the drafts, before maturity, that they had been accepted in this form. The drawers and indorsers became insolvent before they fell due, and they were returned to the Pittsburg bank protested. The only additional circumstance which seems of any consequence to mention is, the fact that two drafts on the "Newark Tea Tray Co.," presented for acceptance previously to those in litigation had been accepted in the same manner without notice to the Pittsburg bank. The Pittsburg bank sued its New York correspondent, reckoning on being able to hold the latter liable for the negligence of the Newark bank. That negligence, as claimed, consisted in failing to obtain the acceptance of the Newark Tea Tray Co., or to have them protested for non-acceptance by that company, and in failing to give notice of the facts to the Pittsburg bank. The Circuit Court, relying upon New York and New Jersey decisions to the same effect, thought the New York bank had exercised intelligent and cautious judgment on the information it had, that at most it erred in judgment as to the import of the address on the drafts; that it had no information to qualify or explain such import; that for it to regard the drafts as addressed to Conger in his individual capacity was not a culpable error, under the circumstances; and that the Pittsburg bank knew who was the intended drawee, and ought to have advised its New York correspondent.

The Supreme Court expressed the following views on the subject:

"The agreement of the defendant in this case was to collect the drafts, not merely to transmit them to the Newark bank for collection. This distinction is manifest, and the question presented is whether the New York bank, first receiving these drafts for collection, is responsible for the loss or damage resulting from the default of its Newark agent. There is no statute or usage or special contract in this case, to qualify or vary the obligation resulting from the deposit of the drafts

with the New York bank for collection." The court here, in the last sentence, refers to the grounds of its decision that the collecting bank was not responsible for the default of the notary employed, because the notary's duties in such cases were prescribed by the statutes of Mississippi, where the case arose. The court proceeds—"On its receipt of the drafts, under these circumstances, an implied undertaking by it arose to take all necessary measures to make the demands of acceptance necessary to protect the rights of the holder against previous parties to the paper. * * * The bank is not merely appointed an attorney, authorized to select other agents to collect the paper. Its undertaking is to do the thing, and not merely to procure it to be done. In such case the bank is held to agree to answer for any default in the performance of its contract; and whether the paper is to be collected in the place where the bank is situated, or at a distance, the contract is to use the proper means to collect the paper, and the bank, by employing sub-agents to perform a part of what it has contracted to do, becomes responsible to its customer." (*Exchange National Bank of Pittsburg v. Third National Bank*, 112 U. S., 284.)

The doctrine of this case has since been followed by the highest courts of Michigan and Montana. With regard to the duty of the collecting bank, and other collecting agents under similar circumstances, the court went on to make some instructive suggestions, as follows:

"What was the duty of the defendant, and what neglect of duty was there? An agent receiving for collection, before maturity, a draft payable on a particular day after date, is held to due diligence in making presentment for acceptance, and if chargeable with negligence therein, is liable to the owner for all damages he has sustained by such negligence. The drawer or indorser is indeed not discharged by the neglect of the holder to present it for acceptance before it becomes due. But if the draft is presented for acceptance and dishonored before it becomes due, notice of such dishonor must be given to the drawer or indorser, or he will be discharged. Moreover, the owner of a draft payable on a day certain, though not bound to present it for acceptance in

order to hold the drawer and indorser, has an interest in having it presented for acceptance without delay, for it is only by accepting it that the drawee becomes bound to pay it, and on the dishonor of the draft by non-acceptance, and due protest and notice, the owner has a right of action at once against the drawer and indorser, without waiting for the maturity of the draft; and his agent to collect the draft is bound to do what a prudent principal would do. In view of these considerations, it is well settled that there is a distinction between the owner of a draft and his agent, in that though the owner is not bound to present a draft payable at a day certain, for acceptance before that day, the agent employed to collect the draft must act with due diligence to have the draft accepted as well as paid, and has not the discretion and latitude of time given to the owner, and for any unreasonable delay, is responsible for all damages sustained by the owner."

Purchase of Commercial Paper.—Bank no Power.—A note of L. Bros. was sold to the Union Bank of Baltimore, by a firm of note and bill brokers, who were employed by L. Bros. to find a purchaser. The bank held a general guaranty of their paper to a specified amount, and this note being unpaid suit was brought against the guarantor. The Court of Appeals, in passing upon the question, threw the bank out of court, on the following grounds:

"The president of the bank testified that the note in question was purchased by notes of the board of directors, and that he had an impression that Lazear Brothers were to get the proceeds of it. He further proved that after the customers of the bank were served, it sometimes invested its surplus funds in notes. We are of opinion that this transaction was an out and out purchase by the bank, and that such purchase was without authority, and that the bank acquired no title to the note, and cannot recover thereon in the suit. While we do not mean to say that a national bank may not invest its surplus capital in notes, we are of opinion that it has no authority to use such surplus funds as may remain on hand from day to day for the purpose of buying notes." (Lazear

v. National Union Bank, of Baltimore, Md., Court of Appeals, April, 1879.)

Notes.—Accommodation to be Paid by Payee as by Agreement.

—A suit was brought to recover the amount due upon six negotiable promissory notes, all made by the defendant to the order of the Valley Worsted Mills, a corporation which endorsed them for value and before maturity, to the plaintiff, a *bona fide* holder, which discounted them for the benefit of the payee. The suit was originally brought in a state court, where an answer was filed. No additional or new pleadings were made after its removal to this court. The portion of the answer which is now material is, in substance, that the said notes were made by the defendant purely for the accommodation of the Valley Worsted Mills, to which corporation they were delivered upon the express condition and agreement with it and with the plaintiff, as the defendant was informed and believed, that all said notes should be taken up and paid at maturity by the payee, “but that the defendants should in nowise be liable upon the same or any of them.” That said notes were discounted by the plaintiff, under and by virtue of said agreement and with its agreement that the defendant should not be liable thereon, and that his name was used for the accommodation of the plaintiff, and because under its rules all paper discounted by it must contain at least two names. That before the commencement of this suit the payee paid to the plaintiff, in full settlement of all its claims upon said notes, a sum equal to forty per cent upon the amount thereof.

The answer concluded with a demand of judgment that the complaint may be dismissed, with costs, and that said notes be delivered to the defendant to be cancelled.

“The only defense which was attempted to be proved was that the plaintiff, which had discounted the notes in suit for the benefit of the payee and indorser in ignorance that the notes were accommodation paper, was, after the insolvency of both maker and indorser, and about the time of the maturity of the notes, informed, for the first time, that the defendant claimed to be an accommodation maker, and that

the payee had promised to hold him harmless; that the plaintiff subsequently released the indorser upon the payment of forty per cent of the amount due upon said notes; that they were accommodation notes, and therefore the defendant was discharged. The offered testimony was, upon the plaintiff's objection, excluded, and there being no other defense, a verdict was directed for the plaintiff. The defendant says that the defense which appeared in the answer was an equitable defense, which could not be received in an action in the Courts of the United States; that according to the rules of this Court, a replader should have been required by the plaintiff, and that none having been asked for, there was a mistrial.

The defense which was alleged in the answer was purely a legal defense, viz: that before and at the time the notes were discounted, it was agreed by the plaintiff that the defendant should not be liable to it, but that it would rely entirely upon the payee. This defense is not inconsistent with the notes, does not seek to vary their terms or the contract which they contained, but sets up a valid agreement by the plaintiff which freed the maker from his liability. This discharge of the maker, if proved, would have been a fact entirely independent of the contract which is shown by the notes, and would have been, without question, a legal defense. (*Hanly v. Boycot*, 2 El. & Bl., 46.)

The fact that the pleader asked, at the end of the answer, for a surrender of the notes, does not turn a purely legal defense into an equitable one.

The defendant next says that the facts which were attempted to be proved constitute a complete defense in courts of law.

"Although the defense upon the alleged facts is borrowed from a Court of Equity and is, in that sense, an equitable one, I do not regard it as a defense which can be administered only by a Court of Equity upon the ground that the belief which is sought must be granted by an injunction or by some other remedy which a Court of Equity only can furnish, or that the defense contains matter which can be considered only at equity. If the sole defendant is not liable to pay the notes, there is no difficulty in an examination by a court of

law, and it is not necessary to resort to the form or mode of relief peculiar to a Court of Equity. There is quite a large class of cases pertaining to the discharge of sureties, upon the principles of which cases this defense rests, in which courts of law take cognizance of defenses which had their origin in the Courts of Equity, but which are administered by courts of law, without disregarding the inherent distinctions between two courts. "In general," said Chief Justice Shaw, in *Carpenter v. King*, (9 Met., 511,) "that which would afford a surety a remedy in equity against his creditor by injunction, is a good defense at law when suit is against the surety alone." Many of the earlier distinctions in regard to the rights of sureties to defend at law, do not now seem to be regarded. The cases upon this point are collected in 2 Amer. Lead. Cases, 448.

"If the defense is purely equitable, and the remedy, if any, must be administered by a Court of Equity, the defendant should have proceeded according to the rules regulating proceedings in equity in the Courts of the United States. (*Burnes v. Scott*, 117 U. S., 582.)

"Upon the theory that it is a defense which can be examined in a court of law, and confining myself exclusively to the question as it relates to the rights of an indorsee and holder of a negotiable instrument, who took the note or bill for value, in ignorance that it was accommodation paper, I am still of the opinion that the defense is inconsistent with the principles which have generally been considered as settled in regard to the rights of *bona fide* holders of negotiable paper, and, if the accommodation maker permits the note to go into the hands of *bona fide* holders for value, without knowledge of the relations between the maker and payee, that he has abandoned all right to enforce his equity as against the ignorant holder. 'He who makes a note or accepts a bill for the accommodation of another, virtually authorizes those who take the instrument subsequently to make such terms or arrangements with the drawer or indorsers as may be most conducive to their mutual interests, and cannot revoke the authority thus given to the injury of those who have acted upon it.' (4 Daniel on Negotiable Instruments, Sections 1336-1338; *Farmers Bank v. Rathbone*, 26 Vt., 19.)

"I do not think it advisable to make an extended argument upon this question, which is an important one and upon which there is a conflict of opinion, because this case will probably go to the Supreme Court, where the question will be authoritatively settled. Meantime the numerous conflicting authorities will be found collected in 2 Daniel on Neg. Instr., 316-321; 1 Pars. on Bills and Notes, 233, and *In re Goodwin*, 5 Dill., 140.

"It may be added that the only decision of the Court of Appeals of New York which is directly upon the point in question in regard to negotiable paper is against the validity of the defense. (*Hoge v. Lansing*, 35 N. Y., 136.) The motion is denied and the stay of execution is vacated."

Motion was made for a new trial. The President, etc., of the Union Bank v. Henry Crine, United States Circuit Court.

Check not an Assignment of Fund.—In *Florence Mining Co. v. Brown*, (U.S. Supreme Ct., January 23, 1888,) the Supreme Court throw the weight of their authority on the side of the New York cases in the negative of the question whether a check on a bank is necessarily such an assignment of the fund represented by it as will enable the holder to maintain an action against the bank. They say:

"An order to pay a particular sum out of a special fund cannot be treated as an equitable assignment *pro tanto* unless accompanied with such a relinquishment of control over the sum designated that the fund-holder can safely pay it, and be compelled to do so, though forbidden by the drawer. A general deposit in a bank is so much money to the depositor's credit; it is a debt to him by the bank, payable on demand to his order, not property capable of identification and specific appropriation. A check upon the bank in the usual form, not accepted or certified by its cashier to be good, does not constitute a transfer of any money to the credit of the holder; it is simply an order which may be countermanded, and payment forbidden by the drawer at any time before it is actually cashed. It creates no lien on the money which the holder can enforce against the bank. It does not of itself operate as an equitable assignment."

This does not seem to impugn the doctrine of that line of cases that hold that in exceptional circumstances—such as where the check is for the full amount of the deposit, and intended to transfer the entire fund, or where the fund itself belongs to the payee—the payee may maintain the action. (See 16 Abb. N. C., 458.)

Rights of Depositors.—The Importers' and Traders' Bank, plaintiff, against William H. Peters as receiver, etc., and others, defendants.

Where a depositor, in opening his account with a bank, agreed that he would not draw upon out of town paper until sufficient time had elapsed for its collection, or for the bank to hear of its collection or protest, such out of town paper did not, on the deposit, become the property of the bank, and the bank could not, without the consent of the depositor, treat the paper in such manner as to acquire the title to it as against the depositor.

INGRAHAM, J. "I think the evidence in this case established that the agreement under which the firm of Everett Bros., Gibson & Co. opened their account with the National Exchange Bank was, that they would not draw upon out of town paper until sufficient time had elapsed for its collection, or for the bank to hear of its collection or protest, and that having been the condition upon which the account was opened, and upon which the business between the depositor and the bank was conducted, it became binding upon the parties. It is clear that out of town paper deposited with the bank under this agreement did not, on the deposit, become the property of the bank, and that the bank could not, without the consent of the depositor, treat the paper in such a manner as to acquire the title to it as against the depositor. Under that agreement the bank did not become the owner of the paper, and the depositor could not have maintained an action against the bank for its amount until it had been paid, or until sufficient time had elapsed in which notice of its payment could have been received.

"The bank did not, therefore, become the debtor of Everett Bros., Gibson & Co. on the deposit of the draft in question,

and no title to the draft was acquired by the bank. If the bank had failed on the afternoon of March 30, it is clear that the depositor would have been entitled to its possession, as against the receiver of the bank.

“The case differs, therefore, from the *National Metropolitan Bank v. Lloyd*, (90 N. Y., 535,) for in that case the paper was delivered to the bank without qualification, and the bank gave the depositor credit for the amount and he accepted it, and by the transaction the property in the check passed from Murray and vested in the bank. The court there said— ‘He (Murray) was entitled to draw the money so credited to him, for, as to it, the relation of debtor and creditor was formed, and the right of Murray to demand payment at once was the very nature and essence of the transaction.’ It will be noticed also that the draft in question was not the draft of a third party, the title to which would pass by transfer or endorsement. It was a draft presented by the depositor on its New York correspondent.

“In the hands of the bank until some consideration had passed, it had no validity; if it had not been by the drawee under the circumstances, Everett Bros., Gibson & Co. would not have been liable to the bank as drawer.

“The draft was sent to New York for the plaintiffs, and on the 31st of March the draft was presented to the drawee and a check given for it, which check was paid on April 1, and on that day the Exchange National Bank was credited with the amount received, and notice sent to them. Up to that time the Exchange National Bank had no title to the money. It had been collected for Everett Bros., Gibson & Co., and under the arrangement no credit was to be given.

“On the second day of April, 1885, at half past ten in the morning, the Exchange National Bank suspended, having been largely insolvent, through the misappropriation of its funds by its officers, and before notice of the payment of the draft was received. As between Everett Bros., Gibson & Co., and the National Exchange Bank, I do not think that the bank acquired any title to the money.

“As before stated, the National Exchange Bank, as agent of Everett Bros., Gibson & Co., sent the draft to its agent for

collection. The agent received the money, but before the money was turned over to the National Bank that bank failed, and the rights of the parties were not changed by the fact that the plaintiff held the proceeds of the draft instead of the draft itself.

"The plaintiff, however, having in good faith, and without the knowledge of Everett Bros., Gibson & Co.'s rights, paid to third parties, on the bank's order, a portion of the proceeds, would be protected to the extent of the amount that they had so paid, but the balance remaining in their hands was the property of Everett Bros., Gibson & Co., and not the property of the National Exchange Bank. Nor would the fact that the plaintiff had received other drafts from the National Exchange Bank and paid out of the proceeds affect the result. There is no evidence that such drafts belonged to others, or to the persons who had deposited them, or that they were not the property of the National Exchange Bank, and the mere fact that they were deposited by customers of the bank would not, of itself, show that the bank did not have title to the drafts. If any portion of this money belonged to others the receiver was bound to show it.

"In *Baker et al. v. National Exchange Bank*, (100 N. Y., 33,) it was held that the relations between a commission agent for the sale of the goods and his principal is fiduciary; that the title of the goods sold is specifically the property of the principal, and he may follow it and claim it so long as the identity of the money is not lost, subject to the rights of *bona fide* purchasers for value; that on the failure of the agent, neither the goods nor the proceeds would pass to his assignee in bankruptcy for general administration, but would be subject to the paramount claims of the principal; and I can see no reason why the same rule does not apply in this case. (See *Knatchbull v. Hallett*, 13 Chan. Div., 696.)

"The only remaining question is whether Everett Bros., Gibson & Co., have lost the right to follow the proceeds of this draft by proving a claim against the bank and receiving a dividend upon it.

"It appears that the bank had been a long time insolvent through the misappropriation of its funds by its president

and cashier; that it had been notified by the Comptroller of the Currency about the 15th of March; that they must repay the amount taken, and that after that the bank went on doing business.

‘No attempt was made to comply with the direction of the comptroller. The acceptance of this draft under those circumstances was a fraud upon Everett Bros., Gibson & Co. (*Crapie v. Hadley*, 99 N. Y., 135.)

“These facts were unknown to Everett Bros., Gibson & Co., at the time they proved their claim and received their dividend. Upon the discovery of that fraud they repudiated the proof of claim so far as it includes the amount of the draft in question, and insisted upon their right to recover the proceeds of the notes of the plaintiff, and this, I think, they had a right to do.

“On the whole case I think Everett Bros., Gibson & Co., are entitled to the fund in question, and judgment is ordered accordingly.”

Filed May 14th, 1888.

BILLS, CHECKS, AND NOTES.

(SEE ALSO CHECKS, PAGE 235,—NOTES, 395.)

Effect of Foreign Discharge in Bankruptcy.—A., living in the United States, drew his bill of exchange upon a Liverpool firm, which he sold to B., living in New York. The bill was accepted by the drawees, but they having failed, it was protested for non-payment. The acceptors were discharged in bankruptcy upon a compromise by the English court. B., who was originally not a party to the bankruptcy proceedings, voluntarily, and without the consent of A., appeared, proved his claim, and accepted the composition decreed.

In an action upon the bill it was decided, that as the foreign discharge would in and of itself have been no defense to the American holder of the bill, and B., had he not surrendered the right, would have been at liberty to proceed by attachment against any property of the bankrupts in B's jurisdiction (New York), to which right it would have been the privilege of A., as surety, to succeed by way of subrogation upon payment of the debt, and as, by the acceptance of the

composition, this right was surrendered, A. was released from liability.

A foreign discharge in bankruptcy is not a defense to an action brought in the United States, upon a debt or obligation of the bankrupt, by a citizen who was not a party to, and did not appear in the bankruptcy proceedings, although such debt or obligation was contracted under the law of the jurisdiction of the Bankruptcy Court, and was to be there paid. (*Phelps et al. v. Borland*, 103 N. Y., 406.)

Qualified and Special Indorsements.—A draft to drawer's own order, purporting to be value received, and indorsed by drawer, "Pay to Mrs. Mary Hook, for the benefit of her son Charlie," was held by the Court of Appeals to give Mrs. Mary Hook a right to maintain an action on the draft without proving a consideration, the court saying—"She was constituted trustee of her son, and held the legal title. The indorsement gave notice of the trust, so that if she had passed it off for her own debt, or in any other manner indicating that the transfer was in violation of the trust, her transferee would take it subject to the trust. But there was nothing reserved in the drawer or indorser." (*Hook v. Pratt*, New York Court of Appeals, October, 1879.)

The following special indorsements were cited as giving notice that the indorsee was agent only, giving no consideration for the bill: "Pay to P. only;" "Pay to my servant for my use;" "Pay to my steward, and no other person;" "Pay to S. W., or order, for our use." In the latter case the words "value received," were held not to give the indorsee a beneficial title.

BILLS OF EXCHANGE.

Form of Bill.—*Acceptance may be Oral.*—"Mr. A. M. Wilson. Please pay Joseph Jarvis one hundred and eighty-nine dollars and twenty cents, and charge the same to me. William Murphy."

Wilson having made a verbal promise to pay the above order, was sued, and judgment had against him as an acceptor. It was contended on appeal that the instrument

could not be treated as a bill of exchange, but should be regarded as a mere promise on the part of the maker. The Supreme Court answered: "We do not see why it does not contain every essential element of the most approved definition of a bill of exchange. It is a written order from Murphy, addressed to the defendant, requesting him to pay the plaintiff a certain sum of money therein named. But, conceding the order to be a bill of exchange, the defendant further claims that he is not liable, because his acceptance was only by parol, when it should have been in writing. It is true, as a general rule, that to make one liable as a party to a bill or note, his name should appear thereon under his own hand or that of his agent. A wise policy may also require that the liability of an acceptor should not depend on parol evidence, and recognizing this, some states have already changed the rule of the common law as to an acceptor of a bill of exchange. In New York it is required by statute that the acceptance should be in writing, and there is a similar statute in England as applicable to an inland bill. But where there is no statute to control, the rule is quite general, both in England and the United States, that an acceptance of a bill of exchange may be by parol." The court accordingly held that there was no error in the judgment. (*Jarvis v. Wilson*, 46 Conn.)

Acceptance by Agent for Company.—Form by which Agent only is Bound. (Ohio.)

"\$265.87.

KANAWHA & OHIO COAL Co.,)
COALBURGH, W. Va., May 14, 1874. }

Seventy-five days after date pay to the order of J. D. Moore
Two hundred and sixty-five and $\frac{87}{100}$dollars

KANAWHA & OHIO COAL Co.,
To JNO. A. ROBINSON, Agent, By W. H. Edwards, President.
Cincinnati, Ohio."

Written across the face of the above bill was the following acceptance:

"Accepted, payable at Lafayette Bank, Cincinnati, O.

JNO. A. ROBINSON,
Agent, K. & O. C. Co."

The Kanawha Valley Bank having become the holder of the bill above described, sued Robinson individually as

acceptor. Robinson answered that his acceptance was not on his own account, but that of the company; that the bill was drawn by the company, upon him as agent, with the intent that it should be so accepted as to bind the company and not him individually, and that the holder of the bill knew this fact when he took it. He was not allowed to prove these averments, and the Ohio Supreme Court affirmed the judgment excluding the offer of proof, and so held Robinson bound individually by the acceptance. The citations by counsel on each side showed great conflict of authority on the question involved, but the Ohio cases were all one way, making a strong line of precedents for the present decision. The Court said—"When the principal, located at one place, draws upon his agent, located at another, the natural presumption is, from the usual course of business, that it is against funds of the principal that are, or will be, in the hands of the agent, and which the principal requests the agent to apply to the payment of the bill at its maturity. * * * Robinson was not bound to accept; or he might have done so on condition that he had funds of the principal at the maturity of the bill, and thus have qualified his obligation. But as it is, his acceptance imports the possession of funds, and obliges him to pay the bill." (Robinson v. Kanawha Valley Bank, 7 Western Reporter, 193.)

In the above case, Robinson had before him, on the very bill accepted, the proper form of signature by which to bind the company and avoid individual liability. He had merely to follow the example of the company's president in drawing the bill, and make the acceptance read "Accepted. Kanawha & Ohio Coal Co., by Jno. A. Robinson, agent." Robinson's lesson cost him several hundred dollars.

BILLS OF LADING.

Indorsement of Bill of Lading.—Indorser does not Contract to Ship or Deliver.—A shipping receipt was issued by the Canada Southern Railroad for sixty barrels of flour, consigned to "Maybee and Hasley, Detroit, M." Upon the back of this paper was indorsed the signature, "Maybee & Has-

ley," and in this form it came into the hands of T., who paid \$180 for it, but never received the property represented. The flour was either withdrawn from the railroad company's hands before shipment, or was never in their custody. T. sued M. & H. in *assumpsit*, alleging that their indorsement of the receipt constituted a contract to ship and deliver the flour. The Supreme Court decided that the instrument contained no such undertaking on the part of the indorsers, and went on to say—"The indorsement of a bill of lading, under the most liberal decisions made any where, is no more than an assignment of the shipper's obligation, and of the property called for by the bill. It involves no promise on the part of the indorser to do anything towards forwarding the property to its destination. It involves no duty whatever in the indorser. If the instrument is fictitious, or if there is any fraud practiced in transferring it, any remedy that the transferee would be entitled to would be for that special wrong." (Maybee v. Tregent, 47 Mich., 495.)

The last sentence is an intimation that the indorser might have been held liable if the proper form of action had been brought. Indorsement "for collection" is therefore suggested as a form which furnishes a safeguard for the indorser.

Restriction of Liability to Invoice Value.—Clause Construed.—A bill of lading issued by the Quebec Steamship Company contained the clause—"in case of damage, loss, or non-delivery, the ship-owners will not be liable for more than the invoice value of the goods." The bill of lading was for fourteen bales, three of which were damaged. The invoice value of the whole was \$2,692.16; the price obtained in the foreign market was \$2,901.85. The invoice value of the damaged goods alone was \$571.05; the actual price received for them was \$184.85. The company claimed that as the shipper received more than the invoice value of the entire shipment, there was no loss for which they were liable. In the United States District Court for the southern district of New York, Judge Brown held that the contract of the carrier under this clause was not analagous to that of a marine insurance contract, but his liability was in tort as well as in contract, and

arose separately upon each item of loss. The carrier was therefore held liable to pay the difference between the invoice price and actual price of the damaged bales. (Pease v. Quebec Steamship Co., 24 Federal Reporter.)

Negotiation of Duplicate Bill of Lading.—Imperfect Title of Holder.—D. sold to T. certain hogsheads of tobacco, shipping them by rail, and sending him with the invoice a bill of lading, marked “duplicate.” Another bill, marked “original,” was attached to a draft drawn on T. at sixty days, and sent through a bank for acceptance. T. sold the tobacco and indorsed the duplicate to C., receiving payment, and on presentation of the draft accompanied by the original bill, refused acceptance. Subsequently T. failed, and D. ordered the goods, then in transit, to be stopped, and returned to him. C. sued the railroad company for the value of the tobacco, but failed in his action, the United States District Court for the western district of Texas holding that C. had notice before he paid for the goods, which should have put him on inquiry as to what disposition had been made of the “original” bill of lading, and therefore did not acquire such a title to the tobacco as to defeat the right of the unpaid consignor to stop it in transit. (Castanola v. Missouri Pacific Railroad Co., 1885.)

“Shipped in Good Order and Condition.”—Acknowledgment in Bill of Lading not Conclusive.—A bill of lading signed at Liverpool, for 250 bales of coir yarn, “in transit” from steamer Macedonia, acknowledged receipt in the usual form, describing the goods as “shipped in good order and well conditioned,” to be delivered in like good order and condition. The yarn was at the time of shipment in the apparent condition described, but the bill of lading contained the clause—“weight, contents, quality, condition, quantity and value unknown, and ship-owner not accountable for the same.” On unlading at New York 100 bales were found damaged by sea-water. The ship-owner contended that they were damaged before they came into his custody, while the consignees contended that the ship-owner could not contradict his own acknowledgment that the yarn was received in good order

and well conditioned. Both the District and the Circuit Courts of the United States for the southern district of New York, concurred in dismissing the libel, Chief Justice Waite delivering the opinion on the appellate case, and expressing the following views:

“The receipt in the bill of lading is an admission that the goods were, when received, in apparent good order, but it is not conclusive as to their actual condition. It makes a *prima facie* case against the ship, and gives the libellants a right to recover unless this case is overcome by evidence. The burden of the admission rests upon the ship until it is shown that the appearance and condition of the goods at the time of their discharge are consistent with the actual existence in the packages of the cause of the damage when the shipment was made, without discovery by the ship's agents, acting in good faith and with ordinary care, while taking the cargo on board. The bill of lading has not been assigned, and it does not appear that any advances have been made on the faith of it. The evidence is, as I think, sufficient to shift the burden of proof from the ship to the libellants. The goods were received while in transit and from the ship. They might have been exposed to sea-water while on their way to Liverpool, and still the damage be such as not necessarily to attract attention as the transfer was made from ship to ship. It was only about ten days from the time of the shipment in Liverpool to the discharge in New York. When the bales were discharged there was no appearance of recent exposure; the wrappers were discolored and the yarn was damp; no other goods were wet, and there was no appearance of any leak in the ship. There was no water to be seen in the hold where the goods were stowed, and none of the other cargo appears to have been damp even. Under these circumstances it appears to me clear that the libellants, before they can recover, must prove that their yarn was actually free from wet or dampness when it went on board.” (Archer v. The Adriatic, 8 Western Reporter, 231.)

Title of Holder Without Indorsement.—Pre-Existing Debt a Good Consideration.—The St. Paul Roller Mill Co. shipped a car-load of flour by the G. W. Despatch Co., consigned to

itself at Boston, making a draft on W., at fifteen days sight, with bill of lading attached, and forwarding the papers, undorsed, to the T. National Bank at Boston, "for acceptance and collection." W. accepted the draft on presentation, and received the bill of lading from the bank without indorsement. He afterwards indorsed and transferred the bill of lading to the National Bank of Redemption, for an antecedent debt which he owed that bank. Before the flour arrived W. failed, and the St. Paul Roller Mill Co. notified the G. W. D. Co. not to deliver to W. or his assigns. The latter did, however, deliver the flour to the holder of the bill of lading, and was sued for conversion of the property.

The United States District Court, Minnesota district, in giving judgment in favor of the carrier, incidentally noticed the question whether the T. National Bank was right in surrendering the bill of lading to W. on his acceptance of the draft, or whether it should have retained the bill until the draft was paid. This question the court regarded as settled conclusively by the United States Supreme Court in the case of *National Bank v. Merchants Bank*, 91 U. S., 92, and said "Whitcomb, on acceptance of the draft, was entitled to the bill of lading, and the title to the flour passed, so that on transferring it to the National Bank of Redemption for an antecedent debt, under an agreement that the bank should sell the flour on its arrival in Boston, and credit him on the debt, he lost control of the flour.

"When the plaintiff, on discovery of Whitcomb's insolvency, notified the defendant not to deliver the flour to him or his assigns, did the right of stoppage *in transitu* exist? There are no circumstances disclosed to show the bill of lading was not fairly and honestly assigned and transferred by Whitcomb; and, if the antecedent debt is a valuable consideration, the answer to this question must be in the negative. * * * The transfer and assignment of a bill of lading is equivalent to a delivery of the property described therein. * * * It is of no importance that it was delivered unindorsed. It was the intention of the shipper that its agent should deliver the bill of lading on the acceptance of the draft." There was, it is true, no instruction to that effect, but the court said—

“Such is the legal inference from the facts, and it is not qualified by the additional words ‘for collection.’” (St. Paul Roller Mill Company v. Great Western Despatch Co., 27 Federal Reporter, 434.)

Bills of Lading as Collateral.—Insecurity of Bona Fide Holder when Bills are False and no Property Shipped.—Slightly Different Footing of Vessel Bills and Railroad Bills.—Conflict in the Courts.—New York, Pennsylvania and Kansas at Odds with the Rest of the Commercial World.

NEW YORK, February 28, 1887.

Editor of the Journal of Commerce :

The direct export of goods, especially of cotton, from inland points in the United States to European ports having lately assumed great dimensions, it has become of great importance to the consignees of such goods who are expected on delivery of the bills of lading to accept the bills of exchange drawn by the consignor against the shipment to ascertain whether the bills of lading which are issued by the railroad company's agent at the shipping station offer to the consignee a full security for correct delivery, equal to that offered by bills of lading that are signed by the master of a vessel.

The principal questions which would seem to arise will be the following :

1. Is the railroad company fully responsible for the signature of its agent ?

2. May not a creditor of the consignor seize the goods before they get shipped on board a vessel, thereby preventing their delivery to the consignee, notwithstanding that the latter has received the bills of lading signed by the agent of the railroad company, and has accepted the drafts drawn by consignor on delivery of the goods to the said agent ? With regard to this question, it has to be considered that, often the goods are not put on board the vessel named on the face of the bill of lading, but on board of any other vessel, whose name is not made known to the consignee.

3. May not difficulties or losses arise to the consignee from the fact that he has no knowledge of the name of the vessel by which the goods are shipped to him ?

FREDERICK H.

The question first stated is of special interest to bankers, commission merchants, and consignees generally. It formed a subject of discussion at the convention of American bankers in Boston last summer, and has in some instances, to our knowledge, been made a matter of special investigation by bankers in this city. The question was one of those taken into consideration by the officers of the Produce Exchange Bank before entering into the business of dealing in foreign exchange. The possibility of banking on false bills of lading is in fact distinctly recognized as a danger, though of course not as one commonly present.

So far as ocean and vessel bills of lading generally are concerned, it is well settled, both in England and in this country, that such bills, issued without receipt of the property described into the custody of the vessel, do not bind the vessel owner, and are therefore valueless in the hands of a banker or other holder. The Maryland Supreme Court has stated the case clearly in the following extract:

“In *Grant v. Norway*, 10 C. B., 665, where the question was for the first time distinctly presented for adjudication in England, the Court of Common Pleas, after full consideration, held that the master of a ship signing a bill of lading for goods which had never been put on board, is not to be considered the agent of the owner in that behalf, so as to make the latter responsible to an indorsee of the bill for value. That decision settled the law in England. It has been followed in many cases in which, in extension of the same principle, it has been held that a bill of lading so signed is not conclusive against the owner as to the *quantity* of goods or cargo shipped. Among the recent cases on the subject is that of *Jessel v. Bath*, L. R., 2 Exch., 267, from which we learn that Parliament, in legislating in the matter, has gone no further than to enact ‘that every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board of a vessel, shall be conclusive evidence of such shipment, against *the master or other person signing the same*, notwithstanding that such goods or some part thereof may not have been so shipped.’ This act leaves untouched the principle and rule of law before

stated, which has been thus firmly settled by the courts, and the vast maritime commerce of England has been, and is to this day (1876) conducted subjected to, and in recognition of that rule.

“In this country the Supreme Court of the United States in *Schooner Freeman v. Buckingham*, 18 How., 182, adopting the case of *Grant v. Norway*, have decided that neither the owner nor the vessel is responsible to an innocent purchaser or holder of a bill of lading signed by the master for goods not actually shipped and intended as an instrument of fraud.” (*Baltimore and Ohio Railroad v. Wilkens*, 44 Md., 11; S. C., 22 Am. Rep., 26.)

In the case where the above language was used the bills were issued by an agent of the “Continental Line,” an association of railroads to which the Baltimore and Ohio belonged, for eleven car-loads of corn which were never received or shipped. The agent, McCluskey, was also a merchant doing business at Owanico, Ill., where the bills were issued, and drew against them on Benninghaus & Co., of Baltimore. The latter made fruitless efforts to make good their loss out of McCluskey, and then sued the railroad company. In considering the point that the documents in question were railroad and not vessel bills, the Court forcibly asked, what good reason exists why the principles just stated should not apply to them as well as to bills of lading used in shipping? The answer was, “We see none,” and the judgment was accordingly in favor of the railroad.

The same view was taken by the United States District Court for the western district of Tennessee, in a case where Robinson, McLeod & Co., of New York, paid drafts with cotton bills of lading attached, issued at Jackson, Miss., by an agent of the Memphis and Charleston Railroad, without having received the cotton. The Court said—“It is thoroughly settled that there is no distinction between a bill of lading given by a carrier on land and one given by a carrier on water.” In reference to some conflicting decisions which will be presently noticed, the Court further said:

“The New York Commission of Appeals has deliberately overruled both the courts of England and the Supreme Court

of the United States, though the lamented author of Hutchinson on Carriers seems to distinguish the case, and the Court itself somewhat relies upon the distinction; and the responsibility for any want of uniformity on the subject must rest on that Court. (*Armour v. Mich. Cent. R. R.*, 65 N. Y., 111.) The Supreme Court of Kansas adopts this view of the New York court in the case of *Savings Bank v. Railroad*, 20 Kansas, 519. On the other hand the Supreme Courts of Maryland, Louisiana, Missouri, Massachusetts and Ohio, sustain *Grant v. Norway* and the *Schooner Freeman* case." (*Robinson v. Memphis and Charleston Railroad*, 9 Fed. Rep., 129.)

This case was decided in 1881, since which time the Pennsylvania Supreme Court has joined New York and Kansas in opposition to the current of authority. In the New York case the point on which the Court distinguished it from *Grant v. Norway* was the issue of the false bills to *Armour & Co.*, the consignees, instead of the shipper *Michaels*. The latter was of course cognizant of the fraud, but *Armour & Co.* were not. But this distinction seems to have been made in order to avoid a plump rejection of the opposing authorities, and the doctrine of estoppel which the Court announced applies equally well to any of the cases cited. Commissioner Dwight, who delivered the opinion, said:

"The only remaining point under this branch of the case is whether the defendant (the railroad company) is not estopped by the statements in the bill of lading from denying that it had sufficient lard secured from *Michaels* to comply with its terms. The defendant's agent was informed by *Michaels* that the bills were to be used at bank on the same day. They were issued with the expectation that they would be acted upon by bankers or other capitalists. It cannot complain if the bills accomplished the purpose for which they were designed. The representations in the bills were made to any one who in the course of business might think fit to make advances on the faith of them. There is thus present every element necessary to constitute a case of estoppel *in pais*.

* * * It is now well settled that fraud is not necessary to constitute a case of estoppel. Though the defendant was induced by the fraud or mistake of *Michaels* to issue these bills, that is immaterial."

These last expressions show that the Court would have come to the same conclusion in the case if the distinction before pointed out had not existed.

In the Kansas case the railroad agent was induced to issue two original bills of lading for the same lot of wheat. Both were negotiated, one, of course, representing no property shipped, and the Court treated it as a false bill, saying that the railroad company was "bound by the act of its agent, and therefore estopped from denying it had the grain stated in the bill sued on."

In the Pennsylvania case the false bill was issued in New York, and the Court conceded should be governed by New York law, but while admitting this fact, the Court took pains to express its approval of the New York doctrine, and announce its adhesion to the doctrine of estoppel. (*Brooke v. N. Y., L. E. and Western R. R. Co.*, 108 Pa. St., 529.)

There has been a late decision by the United States Circuit Court in Texas, in harmony with the current of authorities, holding that a false bill does not bind the railroad in whose name it is issued, but we cannot refer to it by its title.

The result of this examination is that except in New York, Pennsylvania and Kansas, so far as the question has been decided, a false bill of lading, whether railroad or vessel bill, is worthless even in the hands of a *bona fide* holder for value, and the weight of authority is so heavily on that side that the opposite doctrine does not seem likely to be further followed. Perhaps on this last point, however, it would be better to observe Hosea Biglow's caution: "Don't never prophesy unless ye know."

With regard to measures which may be taken by bankers and consignees to protect themselves against the acceptance of false bills the main reliance must be, no doubt, as we have often said, upon character. This is the only solid ground of business confidence. There is a practical objection which bankers appreciate to the course suggested by the Tennessee District Court, but it may be worth repeating, nevertheless. "It is plain," said the Court, "that the bank of Madison, when it discounted the draft and took the bill of lading, could have known, being in the same town, by sending a messenger

to the agent, depot, or warehouse of the company, that this was a false bill of lading. So although these plaintiffs in New York could not so readily have ascertained that fact, they could have protected themselves by refusing to accept the drafts until the cotton had arrived, or until by telegraph they had assured themselves of the existence of the cotton."

With regard to the other points suggested by our correspondent, we answer:

2. A creditor of the shipper cannot seize cotton in transit to the detriment of one who advances on a bill of lading representing the property.

3. There is a disadvantage in a bill of lading covering goods to be shipped by a vessel not yet named, or not rightly named on it. This is especially true where the holder desires to protect his interest by insurance.

Railroad Bill of Lading, no Property Shipped.—Right of Bona Fide Transferee of Bill.—Bills of lading have come into such common use as collateral security for drafts and bills of exchange, that it is of the highest importance to know what conditions are essential to the value of these instruments, as representatives of the property for which they appear to stand. There have been repeated instances where such bills were found to represent no property whatever; and the risk thus suggested is more or less likely to be present in any case. What happens, in such an event, to the banker or consignee, who has paid drafts or advanced money on the faith of a false bill of lading? Can he hold the ship-owner, or the railroad company, whose agent has issued and put in circulation the false voucher?

So far as vessel bills of lading are concerned, the question seems to be settled by long standing adjudications that the master has no authority to issue a bill of lading for property not on board, and cannot bind his owner by the issue of such a bill. But with regard to railroads, the courts seem disposed to maintain a somewhat different doctrine.

In a New York case, a Michigan Central Railroad shipping clerk issued and delivered to one Michaels certain bills of lading purporting to be for lard shipped, knowing, however,

that none had in fact been received by his company. Armour received the bills of lading, and paid the drafts to which they were attached. In a suit against the railroad company to recover from them the money they paid on false and worthless collateral, made by their agent, the Court of Appeals held the company liable, placing the liability, on the ground of estoppel. "The question comes up," said the Court, "whether the defendant is not estopped from setting up as a defense to this action that its statements known by its agents at the time of making them to be untrue, were in fact false, and that no lard whatever was received by the railroad company for or on account of Michaels. The true answer to this question is not involved in doubt. The well recognized principle that a party who, by his admission, has induced a third party to act in a particular manner, is not permitted to deny the truth of his admission, if the consequence would be to work an injury to such third party, appeals to and governs this case." (Armour v. Michigan Cent. R. R. Co., 65 N. Y., 111.)

The Supreme Court came to a similar conclusion, in a case where a railroad shipping clerk at Batavia, N. Y., conspiring with Williams, a shipper of barley to a Philadelphia firm, issued a bill of lading for a lot of barley which was never shipped. The Court said that the railroad company was "estopped from denying what its accredited shipping agent asserted in the bill of lading by which plaintiffs, without any fault on their part, were misled to their injury." (Brooke v. N. Y., L. E. & W. R. R. Co., 108 Pa. St., 529.)

Forged Bills of Lading.—Purchase of the Accompanying Drafts.—Indorsement for Collection.—No Warranty of Genuineness.—Du B., a dealer in hides at Kansas City, offered to the Bank of Kansas City, on several consecutive occasions, drafts drawn on G. & L., of Milwaukee, with bills of lading attached, purporting to have been issued by the Chicago and Alton Railroad Company, for hides shipped to the Milwaukee firm. The latter accepted all of the drafts, and paid four, and then learning that the bills of lading were forgeries, refused to pay a fifth, which the bank had also cashed and forwarded for collection. The bank sued G. & L. to compel

payment, and the latter counterclaimed for the four drafts already paid, contending that they had accepted the drafts in the belief that the bills of lading were genuine, and that the bank had asserted their genuineness by its indorsement on the invoices accompanying them. They also alleged that the bank had been guilty of negligence in discounting these drafts on the faith of the bills of lading presented, without inquiring into their genuineness. Testimony was offered to show that Du Bois was of suspicious reputation, but the bank rebutted this with evidence of his good standing; and after weighing both sides the United States Supreme Court concluded that it was not surprising that the bank had made no inquiry, and dismissed the charge of negligence in this respect. The Court proceeded to lay down the following important principles:

“A bank in discounting commercial paper does not guarantee the genuineness of a document attached to it as collateral security. Bills of lading attached to drafts drawn, as in the present case, are merely security for the payment of the drafts. The indorsement by the bank on the invoices accompanying some of the bills, ‘for collection,’ created no responsibility on the part of the bank; it implied no guaranty that the bills of lading were genuine; it imported nothing more than that the goods, which the bills of lading stated had been shipped, were to be held for the payment of the drafts, if the drafts were not paid by the drawees, and that the bank transferred them only for that purpose. If the drafts should be paid the drawees were to take the goods. To hold such indorsement to be a warranty would create great embarrassment in the use of bills of lading as collateral to commercial paper, against which they are drawn. The bank, after discounting the drafts, stood towards the acceptors in the position of an original lender, and could not be affected in its claim by the want of a consideration from the drawer for the acceptance, or by the failure of such consideration.” (Goetz *et al.*, plaintiffs in error, v. The Bank of Kansas City, U. S. Sup. Court, October Term, 1886; January 10, 1887.)—*Chicago Legal News*, January 29, 1887.

False Bill of Lading.—Carrier not Bound Unless Property Actually Received.—V., owner of a steamboat running on the Mississippi and Ohio rivers, was sued for non-delivery at Cincinnati of one hundred and fifty bales of cotton, for which a bill of lading had been issued by C. & Co., general agents of V. at Memphis, for shipping purposes. D. W. & Co., of Memphis, who obtained the bill, drew on P. in New York for the value of the cotton, and the draft, with bill of lading attached, was accepted and paid. No cotton was shipped, or delivered at the wharf, or to V.'s agents for shipment, as stated in the bill of lading, and the bill was therefore a false one. The contention was made, that the steamboat owner's agents having acknowledged in writing the receipt of the cotton, and P., an innocent third party, having parted with his money on the faith of this written acknowledgment, the steamboat owner was bound. Both the United States Circuit Court for the district of Kentucky and the United States Supreme Court held, on the contrary, that the steamboat owner was not bound. Regarding the bill of lading in one of its aspects as a contract to carry and deliver, the latter authority said that the receipt of the goods lies at the foundation of the contract. "If no goods are actually received, there can be no valid contract to carry or to deliver." Again the Court said, "the ship-owner is not liable for the false statement in the bill of lading, because the transaction was not within the scope of their authority. * * * Before the power to make and deliver a bill of lading could arise, some person must have shipped goods on the vessel. Only then could there be a shipper, and only then could there be goods shipped. In saying this we do not mean that the goods must have been actually placed on the deck of the vessel. If they came within the control and custody of the officers of the boat for the purpose of shipment, the contract of carriage had commenced, and the evidence of it in the form of a bill of lading would be binding. But without such a delivery there was no contract of carrying, and the agents of defendant had no authority to make one." (Pollard v. Vinton, U. S. Sup. Ct., March 20, 1882; 25 A. L. J., 407.)

BONDS.

Invalid Issues.—It is well known that there have been numerous cases in which railroad aid and other municipal bonds have been finally held to be invalid and worthless, by reason of some defect in the power or authority by which the subscriptions were made, or the bonds issued. It is by no means certain that the end of this class of litigation has been reached, although communities, as well as investors, are probably now too wide awake to permit new issues either to be made or marketed, without a better understanding as to their legality than was thought necessary a few years ago. Railroad aid bonds have also fallen into severe disfavor among tax-payers. Nevertheless, cities, villages and towns are constantly creating securities for the purpose of making public improvements; the series of bitter conflicts which have taken place in the effort of communities to cast off unfortunate obligations, unwisely, and in many cases illegally incurred, in the railroad aid bonding period, will afford some instructive examples, and serve to illuminate the future course of public officials, tax-payers and investors alike, in the frequent cases where the principles evolved in these conflicts will apply.

The scene of a conspicuous example is a south-western city which has had a painful degree of prominence in litigation of this kind. One of its consequences has been the reduction of the city of Memphis from the rank of a body anciently the form of the state itself, (*la cite antique*,) to that of a mere "taxing district" in Shelby county. The bonds in question in this instance were issued in 1869 by the Board of Commissioners of Shelby county, Tenn., in payment of a subscription by the county to stock in the Mississippi River Railroad Company. By an act passed in 1867 the county court of any county through which that railroad might run, was authorized to subscribe to its capital stock. A few months later the legislature reorganized the city of Memphis and vested the powers of the Quarterly Court in a Board of Commissioners created by the act. This Board subscribed for the stock and

issued the bonds in question, receiving certificates of stock in exchange, and exercising thereunder the functions of a stockholder. The Tennessee Supreme Court decided that the act creating the Board of Commissioners was unconstitutional, and that the Board had no legal existence. The bondholders argued that the Commissioners were at least officers in fact if not of right, and that their acts in such character were binding on the county. "This contention," said the United States Supreme Court in reply, "is met by the fact that there can be no officer, *de jure* or *de facto*, if there be no office to fill. * * * * * An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

The next position of the bondholders was that the county had ratified the act of the Commissioners in issuing the bonds. The alleged ratification consisted first in a vote by the re-established county court establishing a rate of taxation for the bonds in dispute. Before another meeting of the court the new Constitution of Tennessee came into effect, requiring a preliminary three-fourths majority of voters at a county, city or township election, authorizing a loan of the public credit, or a subscription in aid of any person, company or association, before it could be lawfully made. The assent of three-fourths of the voters of Shelby county was never given, and the United States Supreme Court held that the county court never did ratify, and after the adoption of the new Constitution had no longer the power to ratify the invalid subscription by its own mere vote. The bondholders were therefore, of course, turned out of court without their money. The Court suggested, however, that the county could be compelled to surrender the stock of the railroad company, or to pay its value. (*Norton v. Shelby County*, 118 U. S., 425.)

CARRIER.

Connecting Lines.—Special Contracts of First Carrier do not Enure to the Benefit of the Second.—Goods were shipped at Springfield, Mass., by the Hartford and New Haven Railroad,

consigned to San Francisco via certain other roads. At New York they were delivered to one of the dispatch companies, by which they were carried to Chicago and stored. While thus stored they were destroyed in the great Chicago fire, October 8, 1871. The company claimed exemption from liability for the loss, by reason of the special clause of the shipping receipt given by the Hartford and New Haven road, exempting the latter road from liability for loss beyond the terminus of its own line. It was contended that in the absence of evidence showing an express contract, the law would raise a presumption that the goods were to be carried by the connecting lines on the same conditions under which they were received by the first carrier. The Supreme Court, however, laid down a different rule, and said:

“The liability of defendant as a carrier upon receiving the goods, in the absence of an express contract, is fixed by the law. If that liability is limited in this case it must be on the ground of some contract which the law will presume upon the goods coming into the hands of the defendant. The law will not presume such a contract, unless a party be found who had the power to contract with defendant for the plaintiff, for it is a conceded fact that plaintiffs or their consignors made no such contract. Now it is not claimed that such a contract was in fact made for plaintiffs by the Hartford and New Haven Railroad Company. Had this company authority to contract for plaintiffs? Clearly not. It was not the plaintiffs’ agent for the purpose of transshipping the goods. The routes over which they were to be carried were clearly indicated by the directions on the packages. It was the duty of the Hartford and New Haven Railroad Company as a carrier, not as plaintiff’s agent, to deliver the goods to the defendant. The defendant on receiving the goods from the connecting railroad assumed the duty of a common carrier, as fixed by law. It was required to deliver the property to the other carrier whose line of transportation was next in the route over which the goods were to be carried. It was not relieved of responsibility by storing the property, and by holding the goods in the warehouse its liability as a carrier continued.

Such liability extended to and covered the loss of the goods by the fire. (*Bancroft v. Merchants Dispatch Transportation Company*, 47 Iowa; 8 Western Reporter, 46.)

Connecting Line.—Liability of First Carrier for Damages to Goods while in Connecting Line's Possession, Before Freight Guaranteed.—1. When a common carrier accepts goods for transportation to a point beyond its terminus, and as a prerequisite receives an advance deposit of money for the charges through to destination, there is imposed upon such carrier the obligation not only to discharge its duties as a common carrier in reference to the goods over its own line, but also to deliver them, at its terminus, to a connecting carrier in such a manner that the latter shall be under the same obligation as a common carrier in reference to the goods, which it would have been under had it received the goods from the consignor, with advance payment of freight.

2. Where an agreement exists between such first carrier and the connecting carrier that neither shall consider any goods as delivered from one to the other for transportation unless the freight to be earned is paid, or the way-bill indorsed "Freight charges guaranteed," the first carrier cannot by placing the car containing the goods on a track used in common by both carriers, and notifying the connecting carrier thereof, but without paying or guaranteeing the latter's freight charges, relieve itself of liability for the goods, or impose liability therefor upon the connecting carrier. (*Palmer v. Chicago, B. & O. R. R. Co. and Pennsylvania Co.*, (Conn.) 6 New Eng. Rep., 470; *Central R. R. Co. v. Avant*, (Ga.) 5 S. E. Rep., 78.)

Delay in Delivery.—Negligence.—For recent cases in this connection see *Tarbell v. Royal Exchange Shipping Co. Limited*, June 29, 1888, (N. Y.) 17 N. E. Rep., 721; *Waik v. N. Y. Cent. & H. R. R. Co.*, (N. Y.) June 26, 1888, 17 N. E. Rep., 730.)

Duties and Liabilities of Connecting Line.—Strike.—The duty imposed on railroad companies in Iowa by the laws of that State and by the "Interstate Commerce Act," (Act of Congress, February 4, 1887,) of receiving from connecting roads

freight and passengers, is one which the federal courts in that State will enforce by mandatory injunction, where the inquiry resulting from its non-performance is continuing; and it is no defense to such relief that a strike of locomotive engineers and firemen has been ordered on plaintiff's road, and that if defendant's road should accept cars from the "boycotted" road its own men would be called out. (*Chicago, B. & Q. R. R. Co. v. Burlington C. R. & N. R. R. Co.*, 34 Federal Reporter, 481.)

Connecting Lines.—Rights and Liabilities.—1. A railroad which takes freight from another railroad for transportation over its line, in accordance with an agreement between the latter road and the consignor becomes liable to the consignor for failure to perform the contract so far as its line is concerned, and is entitled to the benefit of any limitation of liability contained therein. (*St. Louis, I. M. & S. R. R. Co. v. Weakly*, (Ark.), 8 S. W. Rep., 134.)

NOTE.—Respecting the liability of carriers for the negligence of connecting lines, see *Railway Co. v. Pritchard*, (Ga.), 1 S. E. Rep., 261 and note; *Wallingford v. Railway Co.*, (S. C.), 2 S. E. Rep., 19; *Railroad Co. v. Rogers*, (Texas), 3 S. W. Rep., 660; *Association v. Wood*, (Miss.), 2 South. Rep., 76; *Knott v. Railroad Co.*, (N. C.), 3 S. E. Rep., 735; *Railroad Co. v. Avant*, (Ga.), 5 S. E. Rep., 78.

Special Conditions Limiting Liability.—The Shipper's Right to Reject them.—His Course in that Case.—"The receipt by the consignor of a bill of lading containing a contract restraining or limiting the common law liability of a common carrier in the absence of fraud or mistake, is binding on him whether it is read by him or not. All the authorities hold that the consignor is not bound to accept or agree to the terms of this special contract in restriction of a carrier's liability; but in such cases it is his duty to refuse to accept the written instrument limiting such liability by returning it to the carrier, after he has had time to ascertain its contents, with notice of his non-acceptance. The weight of authority, both in this country and England, is that by receiving and accepting the bill of lading the consignor becomes bound by its terms, in the absence of fraud or mistake." (*Louisville and Nashville R. R. Co. v. Brownlee*, 14 Bush., Ky. Court of Appeals.)

Limiting Liability.—When Limitation is Reasonable.—A clause in a bill of lading of live stock which limits the carrier's liability to the sum of \$50 for each animal lost, when based upon reduced charges for their transportation, is reasonable, and will be made the measure of damages, although the animal killed was worth from \$600 to \$800.

Evidence.—Declarations.—Res Gestæ.—In an action against a railroad company for the death of a jack while being shipped over its road, the evidence showed that a tramp, with a stick in his hand, was found in the car with the jacks; that soon after being removed from the car by the conductor, he said, in the latter's presence: "If it had not been for tapping them mules over the head, I would have froze." Afterwards the jack was found lying dead in the car with blood running out of its mouth and nose. Held, that the declaration of the tramp, not being part of the *res gestæ*, was inadmissible in evidence.

A carrier may contract to ship freight at a lower rate than the published tariff, but not to deny the same reduced rate to other shippers. (*Christie v. Missouri P. R. Co.*, (Mo.,) 13 Western Reporter, 688.)

A carrier is liable where its negligence, mingled with the act of God, is the cause of the loss. (*Haney v. City of Kansas City*, (Mo.,) March 5, 1888, 13 Western Reporter, 622.)

Goods Delivered Under Contract.—Where goods are delivered to a carrier for transportation under an agreement which does not provide for any restriction of the carrier's common law liability, the mere fact that it was contemplated that a bill of lading would be thereafter furnished will not (especially in the absence of any evidence of a course of business between the parties or of any custom or usage sanctioning such an interpretation of their preceding negotiation) justify the carrier in inserting in such a bill of lading clauses restrictive of the usual liability of carriers; and in such a case the carrier's liability will be governed by the original agreement, and not by the bill of lading. (*Park v. Preston*, 11 Central Rep., (N. Y.,) 280.)

Right to Limit Liability of.—Note to Pennsylvania R. R. Co. v. Raiordan, (Pa.,) 12 Central Reporter, 177.

NOTE.—The original common law rule that common carriers were liable for all losses except those occasioned by the act of God or the public enemy had by the commencement of the present century become so far relaxed in England that it was held without question that such carriers might by due notice or special contract relieve themselves from responsibility even for gross negligence. (Maving v. Todd, 1 Stark, 72; Leeson v. Holt, 1 Stark, 186.) And although many cases are to be found where the courts express regret that the relaxation of the ancient rule had gone so far, yet they confess their inability to recede from the new rule without legislative action. Parliament therefore embodied in Section 7 of the Railway and Canal Traffic Act of 1854, (17 and 18 Vict. C., 31,) to be found in 1 Interstate Commerce Reports, 845, a provision that every railway or canal company should be liable for loss of or injury to any animals or goods occasioned by the neglect or default of the company, notwithstanding any notice or condition given or made limiting such liability; but the force of this enactment was much weakened by an accompanying proviso that nothing in the Act contained should prevent such companies from making such conditions with respect to animals or goods as should be adjudged by the court or judge before whom any question relating thereto might be tried, to be just and reasonable.

The courts of this country have been much stricter than those of England, and with the exception of the states of New York and West Virginia it is believed to be the settled rule that although a carrier may by contract relieve himself from liability as an insurer he cannot relieve himself from liability for negligence on the part of himself or his agent.

This rule was established for the federal courts by the leading case of N. Y. Central R. R. Co. v. Lockwood, 84 U. S., 17 Wall., 357, (21 Led., 627), where it is held that a common carrier cannot lawfully stipulate for exemption from responsibility when the exemption is not just and reasonable in the eye of the law; and that it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or servants.

The statutes of some of the states have gone even further than the courts in restraining the power of carriers to limit their liability by notice or contract. For instance in Iowa it is provided by an Act passed in 1866, that in the transportation of persons or property by any company or person, no contract, receipt, rule or regulation shall exempt the carrier "from the full liability of a common carrier, which in the absence of any contract, receipt, rule or regulation, would exist with respect to such person or property." And in Texas, a statute enacted in 1860 is to the effect that carriers within that state may not "limit or restrict their liability, as it exists at common law, by any general or special notice, nor by inserting exceptions in the bill

of lading or memorandum given upon the receipt of the goods for transportation, nor in any other manner whatever."

In *New York* the rule is now settled that a carrier may by contract relieve himself from liability even for negligence, but to have that effect the contract must in terms and expressly exempt the carrier from liability on this account; and hence general terms, such as a release from liability "from whatsoever cause arising," or for "damage occasioned by delays from any cause," will not relieve the carrier from the results of negligence. (*Maguire v. Dinsmore*, 56 N. Y., 168; *Mynard v. Syracuse, etc., R. Co.*, 71 N. Y., 180; *Nicholas v. N. Y. Central, etc., R. R. Co.*, 89 N. Y., 370.)

Limiting Liability.—Note to *Alabama G. S. R. R. Co. v. Thomas et al.*, (Ala.,) 3 Southern Reporter, 804.

Common carriers may by contract limit their common law liability when the limitation is one reasonable in character; (*Hart v. R. R. Co.*, 5 Sup. Ct., Rep., 151, 7 Fed. Rep., 630; *The Bermuda*, 29 Fed. Rep., 399, 27 Fed. Rep., 476; *The New Orleans*, 26 Fed. Rep., 44; *The Lydian Monarch*, 23 Fed. Rep., 298; *Sprague v. R. R. Co.*, (Kas.,) 8 Pac. Rep., 465;) but a contract is invalid which seeks to relieve it of such liability for its negligence, or that of its servants, (*R. R. Co., v. Harris*, (Texas,) 2 S. W. Rep., 574; *The Surrey*, 26 Fed. Rep., 791; *Ruibone v. R. R. Co.*, 17 Fed. Rep., 905; *May v. The Powhatan*, 5 Fed. Rep., 375; *Ormsby v. R. R. Co.*, 4 Fed. Rep., 706; *Moulson v. R. R. Co.*, (Minn.,) 16 N. W. Rep., 497,) or of liability for any degree of such negligence. (*Ormsby v. R. R. Co.*, 4 Fed. Rep., 706.)

A stipulation requiring the shipper to give notice of his claim for damages before removing the goods is void. *Smithers v. R. R. Co.*, (Tenn.,) 65 W. Rep., 209; but such stipulation was held reasonable in *Sprague v. R. R. Co.*, (Kan.,) 8 Pac. Rep., 465. For further cases respecting right of common carrier to limit his common law liability by contract see *Express Co. v. Durnell*, (Texas,) 6 S. W. Rep., 765; *Railroad Co. v. Thomas*, (Ala.,) 3 S. W. Rep., 802; *Railroad Co. v. Riordan*, (Pa.,) 13 Atl. Rep., 324; *Platt v. Railroad Co.*, (N. Y.,) 15 N. E. Rep., 393; *Railroad Co. v. Sherrod*, (Ala.,) 4 South. Rep., 29.

This rule is now observed in *New York* without question, as for example, in the recent case of *Tanner v. N. Y. Central, etc., R. R. Co.*, 11 Cent. Rep., 382, where a shipper recovered,

on proof of negligence on the part of the carrier, for loss of goods through fire, although the special freight contract under which they were shipped released the carrier from liability for loss by fire, but contained no express release from liability for negligence.

In *West Virginia* a common carrier may, by contract clearly expressed, relieve himself from all liability, except for fraud. (*B. & O. R. R. Co. v. Skeels*, 3 W. Va., 556.)

The following are recent cases on this subject:

A carrier may limit its liability as an insurer but not from its neglect or fraud. (*Rosenfeld v. Peoria, D. & E. R. R. Co.*, (Ind.,) 1 West. Rep., 151; *Carroll v. Missouri P. R. Co.*, (Mo.,) 3 West. Rep., 842; *Pennsylvania R. R. Co. v. Wilson*, (Pa.,) 3 Cent. Rep., 915; *Grogan v. Adams Express Co.*, (Pa.,) 5 Cent. Rep., 298; *Adams Express Co. v. Holmes*, (Pa.,) 8 Cent., 155.)

A carrier may limit its liability to damages arising on its own line. (*Wabash, St. Louis and P. R. R. Co. v. Jageman*, (Ill.,) 7 West. Rep., 863.)

A carrier cannot by contract avoid statutory liability for negligence of connecting carrier. (*Orr v. Chicago & A. R. R. Co.*, (Mo. App.,) 4 West. Rep., 260.)

In *Burroughs v. Grand Trunk R. R. Co.*, (Mich.,) 11 West. Reporter, 482, the court was divided as to whether a way-bill lessening common law liability affected connecting lines.

Where goods are delivered to carrier under agreement not restricting its common law liability it cannot thereafter insert in bill of lading clauses restrictive of its usual liability. (*Park v. Preston*, (N. Y.,) 11 Cent. Rep., 280.)

Where goods marked to a consignee at a point beyond the terminus of the receiving railroad, were delivered by the shippers to the company, accompanied by a "dray ticket" providing that the goods should be forwarded "subject to the company's regular bill of lading," which gave the company the option of choosing the route from its terminus, and the usual route was by water, if the company delivered the goods at its terminus to a steamer for designated destination, its liability ended. (*Hostter v. Baltimore R. R. Co. vs. Davis*, (Pa.,) 10 Cent. Rep., 352.)

Negligence of Carrier.—The doctrine of the Kentucky Court of Appeals was declared in a case of loss of tobacco by a negligent fire at a station on the Louisville and Nashville Railroad. The tobacco was in custody of the carrier under a shipping receipt which purported to exempt him from liability for loss “while in depots or landings at points of delivery.” The court declared that—“Common carriers may restrict their liability as insurers by special contracts with their customers; but cannot, by contract or otherwise, obtain exoneration from loss which is the result of the negligence of themselves or agents.” (L. & N. R. R. Co. v. Brownlee, 14 Bush.,) (1879.)

Loss by Negligence of Carriers.—The “Negligence Clause” of Ocean Bills of Lading Construed.—Conflict of Foreign and American Law.—The Latter Held to Govern.—The question whether, under the ocean bills of lading now in general use, the shipper has any recourse upon the underwriters, in case of a loss by the negligence of the master or other servant of the carrier, directs attention to an important decision on the clause of such bills which purports to release the carrier himself from any liability in such case. The English courts have given effect to the clause, but thus far, at least, the American courts have refused to follow the example. Ordinary marine policies of insurance do not bind the underwriters to pay the losses thus thrown off. Many of the English and some of the American companies are now writing policies which do cover them by a special clause; but without such a stipulation a shipper who meets with a loss from the cause specified, if forced to seek redress in the English courts, has no remedy whatever, and can hold neither the carrier nor the underwriter. This situation of things renders it of the utmost consequence to shippers to know whether under the bills of lading given by the foreign steam-ship companies which do the bulk of our ocean carrying trade, their rights are to be measured by foreign or by American law.

An answer was given to this interesting question by Judge Brown in the United States District Court for the southern district of New York in the case of the steam-ship Brantford

City. In shipping and underwriting circles the previous decision in the Montana case, now gone to the Supreme Court, has been duly noted, and its progress watched. That decision was to the effect that a carrier cannot stipulate for exemption for the negligence of his own servants. The friends of the new bill of lading hope for its reversal by the Supreme Court, or by legislation, but meanwhile comes the Brantford City decision, (29 Fed. Rep., 373,) which not merely covers the same ground in the same way as in the Montana case, but goes beyond, and holds that the right of shippers under the bills of lading issued here by foreign steam-ship companies are determined by the American and not by the foreign law on the subject. Judge Brown says:

“The question presented is a very important one. All the steam-ship lines, whether domestic or foreign, that sail from this port, insert in their bills of lading substantially the same conditions. Considering the magnitude and number of the shipments by these lines, and the very diverse views found in the text-books and decisions upon this branch of the conflict of laws, I have deferred a decision of the case until able to give the questions involved something at least of the consideration their importance demands. The conclusion to which I have come is that our law must prevail, whether the question be viewed as a question of responsibility for a tort, or of the construction and validity of the exceptions in the bill of lading, in a conflict of laws, or as a question of evidence and procedure, or as a question of comity as related to our national policy.”

The libel in this case was filed to recover \$40,000 damages for the loss of two hundred and thirty-four cattle on a voyage from Boston to West Hartlepool, England. The freight contract was made in Boston with Brigham & Co., the local agents of the British ship, Brantford City, and the cattle were shipped and bills of lading given containing the familiar “negligence clause,” excepting responsibility for loss or damage from the perils specified, “whether arising from the negligence, default or error of judgment of the master, mariners, engineers, or others of the crew, or otherwise.” All but twenty-six of the two hundred and sixty head of cattle

shipped died or were thrown overboard on the voyage. "The shippers alleged that the loss of the cattle was occasioned through the negligence of the ship-owners in the following particulars: First, that the steam-ship was improperly stowed, so as to be unseaworthy when she sailed, having a list to port and being down by the head; second, that the fittings for the cattle were insufficient and improper, the head-boards being weak and insecurely fastened, and the cleats on the floor insufficient to prevent the cattle from slipping; third, that the ventilation was insufficient; and fourth, that the navigation was unskillful and negligent." The ship-owners denied any negligence; they also set up the stipulations of the bill of lading as a defense in case any negligence should be established; and they further pleaded that these stipulations are valid by the British law, and that that law governed the case.

The judge found the immediate cause of the loss was a lurch of the ship, throwing her nearly upon her beam's ends, and said: "Upon repeated consideration of all the testimony, I find it impossible to become satisfied that this heavy lurch is reasonably to be accounted for by any thing in the weather, the sea, or other circumstances, had the usual and reasonable skill and precautions been observed in the fittings, the stowage, and the navigation of the ship." It was also found that there was negligence in the fittings, that this negligence arose before the cattle were shipped and the voyage commenced, and that "the exceptions in the bill of lading, carefully scrutinized, will be found not to include any exemption from negligence in these particulars." The observation will no doubt afford a hint for the steam-ship companies suggestive of further amendment to their bills. But the Court expressly declined to hold the carriers liable on account of this weak point in their case, and placed their liability distinctly on the ground that as he could not find that the loss of the cattle would have probably happened if there had been no negligence in the fitting and stowage, the real cause was negligence such as they stipulated against as a cause of liability, and that such stipulation is invalid by American law.

The decision covers all outward shipments made from other American ports, and until reversed renders nugatory the mooted feature of the bills of lading in use.

Rule of Damages for Non-Delivery.—Stipulation that Invoice Value shall Govern.—Fourteen cases of goods shipped on the steamer Hadji from New York to the West Indies, were damaged on passage, in consequence of negligent construction or repair of the steamer's ballast tanks. Damages were fixed in the report of the Commissioner, in admiralty, upon the basis of six and a half cents per square yard as the market value of the goods at St. Thomas, if uninjured. The ship-owners claimed error under a clause contained in the bill of lading, as follows:

“In case of damage, loss, or non-delivery, the ship-owners are not to be liable for more than the invoice value of the goods.” The invoice value was five cents per yard, instead of six and one-half; and the United States District Court for the southern district of New York decided that the invoice value was the measure of damages, by virtue of this clause, and that the clause itself fell within the cases of reasonable regulations which it is competent for the parties to make. The Court said—“There are special reasons of convenience and policy why this measure of damages may well be adopted between the parties and sustained by the Court. In case of loss or injury it avoids controversy as to the value in foreign and distant countries, often a matter difficult to ascertain with any accuracy, and uncertain and unsatisfactory on the proofs. The invoice value, as the limit of liability, renders the ascertainment and adjustment of the damages comparatively easy, and tends materially to check the litigious prosecution of exaggerated claims of damage which this Court has been often called on to rebuke.” (The Hadji, 18 Federal Reporter, 459.)

Damage to Cargo by Rats.—Liability of Carrier though Exempted on Account of Loss by Dangers of the Seas.—Under a bill of lading and charter-party which relieved the carrier from losses by reason of “all and every dangers and accidents of the seas, rivers, and navigation, of whatever nature and

kind soever." Pandorf & Co. shipped a quantity of rice on board a vessel owned by Hamilton, Fraser & Co., from Akyob to Liverpool. During the voyage, rats gnawed a hole in a pipe connected with a bath-room in the vessel, and sea-water came in and damaged the rice. It was admitted that all reasonable precautions had been taken to keep down the rats on the voyage to Akyob. The jury found that they were not brought on board by the shippers in the course of loading the rice, and that reasonable precautions were taken by those in charge of the vessel to prevent the rats from coming on board. Pandorf & Co. sought to make the ship-owners pay the damage, but the latter stood on the ground that the loss was caused by a "danger of the seas," for which they were not liable. This view was also taken by the lower court. The Court of Appeal, however, reversed the judgment, and gave the case to Pandorf & Co.

Lord Esher, Master of the Rolls, observed with considerable emphasis—"Rats do not come from the sea. They are not generated by the sea. They are no more a difficulty on board ship than in a warehouse or mill." (Pandorf v. Hamilton, L. R., 17 Q. B. D., 670.)

Vessel must Provide Safe Gang-Plank.—Right of Passenger to go Ashore for Temporary Object.—The widow of a passenger on the steam-ship *Australia* brought an action to recover damages for the death of her husband, who while passing from the steamer to the pier fell from the gang-plank and was drowned. The vessel was to sail early in the morning, and he went on board the evening before, shortly afterwards going ashore again to buy some tobacco. The testimony showed, in the opinion of the court, that the landing plank consisted merely of a single narrow plank, laid from the gangway to the pier, without battens or ropes. In rendering a decree for the libellant, in the United States District Court for the eastern District of New York, Judge Benedict defined the rights and obligations of the parties as follows:

"In behalf of the defendant, it is said that if the decedent, as his wife says, attempted to go ashore to get tobacco, he placed himself outside his contract as a passenger, and the

defendant was under no obligation to provide him with a means of egress from the steamer for such a purpose. To this I cannot assent. In my opinion the decedent, when on board as a passenger, had the right to go ashore when he did, and it was the duty of the defendant to provide a safe means of passage from the steamer to the pier. The necessity on the part of a passenger, who has taken his position as a passenger, to return to the pier, is a common incident of travel. It is constantly done to find lost baggage, to speak to a friend, and may be done to purchase tobacco by any one addicted to the use of that weed. From this necessity arises the obligation on the part of the ship to keep and maintain for the passengers' use, at all proper times, a safe passage way from the steamer to the pier. This duty was not in this instance discharged, and for that reason the defendant is liable in damages, which damages the libellant, by virtue of the statute of New York, is entitled to recover." (*Hrebrik v. Carr*, 29 Fed. Rep., 298.)

Illegal Rates Paid to a Carrier are not Paid Voluntarily, and may be Recovered Back.—The Law's Delays.—The rule that voluntary payments, though made unwillingly, cannot be recovered back, has some proper exceptions, among which is one established by the Ohio Supreme Court in the case of *Peters v. Marietta & Cincinnati Railroad Company*, 42 Ohio State Reports, (1884.) The plaintiffs were operators of blast furnaces situated on the line of the Scioto and Hocking Valley Railroad, and depended exclusively upon the road for transportation. Complaint was made that they were charged excessive freight rates, and upon reference to a special master he found and reported that such was the fact. He further reported "that the payment of such excess was compulsory in the sense that plaintiffs and defendant did not stand on a footing of equality, that said laws exacted were illegal and unauthorized, and that plaintiffs were required to pay the same to procure the transportation of their property, without which the plaintiffs in each of said cases, by reason of their manufacturing business, would have suffered great loss."

The Court of Common Pleas held that the payments were

voluntarily made and under such circumstances they could not be recovered back. The defense made the specific point that the illegal charges were so "paid voluntarily after the services for which the same were demanded had been fully rendered and performed." The Supreme Court explained this further by saying that "the defendant did not require the payments to be made in advance of carrying each shipment of freight, but the charges of each month were required to be paid at the end of the month or future freight would not be carried." The judgment of the Court below was reversed, and judgment rendered for plaintiffs, accompanied by the following emphatic statement of reasons:

"Plaintiffs could compel the defendant to carry their freight only by a resort to the courts and at the end of litigation. The history of these suits, begun in 1867, and just ending in 1884, shows that plaintiffs could not obtain speedy and adequate redress—such as would save their business and prevent loss—simply by a resort to the courts to enforce legal rights. And as defendant would not accept the payment of legal rates, and required the full payment of its illegal charges, the plaintiffs complaining and objecting to the increased and illegal charges, were forced to pay them. Such payments are not voluntary."

Goods Taken "At Owner's Risk."—"Released" Rates of Transportation.—Extent of Carrier's Liability.—In the freight classifications of railroads, a different and lower rate is attached to goods taken "at owner's risk," than to those taken at "carrier's risk." The following is a form of one of the contracts which shippers are required to sign, if they desire to take advantage of the lower rate:

YEARLY RELEASE.—RELEASE NO. 4.

SPECIAL FREIGHT CONTRACT.

NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

.....Station.....18....

In consideration of one dollar, to me in hand paid by the New York Central and Hudson River Railroad Company, the receipt whereof is hereby acknowledged, and in consideration of the said New York Central and Hudson River Railroad Company receiving and carrying, at tariff rates, and without extra charge, all freight consisting of:

.....which may be delivered by me to said company from the.....day of.....18..., to the.....day of.....18..., which property, by reason of its size or weight, or inherent qualities,

or the manner in which it is packed or marked, or other peculiarity of said property, or of the circumstances under which it is received, is liable to extra hazards, it is agreed between the said company and the shipper thereof that the said company, and the railroads and boats with which they connect, and which receive such property, are hereby released from liability for loss occasioned by mob, riot, insurrection, or rebellion, and all damage incident to a time of war; also from liability for leakage of all kinds of liquors, shrinkage or deficiency in weight or measure of all grains, or other property shipped in bulk, arising from any cause; breakage of all kinds of glass or crockery; carboys of acid, or articles packed in glass; stoves and stovefurniture, castings, machinery, carriages, furniture, musical instruments of all kinds; packages of eggs; or for loss or damage on hay, hemp, cotton, or any article the bulk of which renders it necessary to be shipped in open cars, or for damage to perishable property of all kinds occasioned by delay from any cause, or change of weather; or for damage and loss while in the company's depots; from damage or loss on the sea, lakes or rivers; also from breakage or chafing, or loss or injury by fire or water, heat or cold or collision; also from the wrong carriage or wrong delivery of goods that are marked with initials, numbered or imperfectly marked, or where the marks or directions on packages are made on paper or cards. And in consideration aforesaid, I agree to indemnify and save harmless said company from any and all claims made by any consignee of any of said property for loss or damage thereto arising from any of the causes aforesaid while in the possession or under the control of said company.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

(Signature,) Station Agent.

(Signature,) Shipper.

(Signature,) Agent.

Signed in duplicate.

It is plain enough why the carriers desire to bind the owners of freight by one of these "release" contracts instead of accepting a simple memorandum directing them to carry the freight on "owner's risk" terms. The way goods are ordinarily sold, the buyer paying freight, and directing the line of shipment, the delivery is made when the carrier receives the merchandise into his custody, that is, it belongs to the buyer from that moment, the vendor simply preserving his lien. He may or may not have the authority to act as the buyer's agent in directing the shipment at "owner's risk." In case of loss or damage, the carrier would be put to his proof, and might find it difficult to prove that the consignee was bound by the shipper's act. The signed release removes this difficulty. It may be observed that it skillfully flanks the question whether the shipper can by any contract of his own release a claim of the consignee. The shipper is made to contract for himself that he will "indemnify and save harmless" the carrier from any claim for loss or damage which the consignee may make. Save that under our laws such a contract would be ineffectual to release the carrier from the con-

sequences of his own negligence, the forms printed above will otherwise bind the signer, whether he is the owner of the goods shipped or not. It is not so much a release as a guaranty.

In Lawson's "Contracts of Carriers," Section 187, the following general definition is given:

"The term 'owner's risk,' in a contract for the transportation of goods, imports that the owner assumes the risks arising from the ordinary dangers of transportation by the means employed, which the reasonable and ordinary care of the common carrier might be insufficient to prevent, and the latter is liable only for those dangers which, with ordinary care and prudence, might be avoided. He will still be answerable for his own negligence or misconduct, or that of his servants or agents. A loss arising from embezzlement of the goods is not within the phrase."

The phrase has been construed judicially in several cases. In that of *Lewis v. the Great Western Railway Company*, 26 W. R., 255, in the English High Court of Appeal, the agent of Lewis in London sent to the carrier a lot of Cheshire cheeses, accompanied by the following consignment note:

To the Great Western Railway Company.—Please receive and forward to Mr. G. Lewis' order, Market Hall, Shrewsbury (here follows an enumeration of the goods). "Owner's Risk. From W. J. Hutchinson."

When the cheeses arrived at Shrewsbury they were found to be much damaged, in consequence of the improper manner in which they had been packed by the servants of the carriers, and action was brought to hold them liable for damage. The defense was that the goods were carried at "owner's risk." There was evidence that the company were in the habit of carrying goods at two rates, the one a reduced rate at "owner's risk," which was explained on the consignment note to mean that the carriers were to be free from liability for any loss not caused by the willful negligence of the company's servants.

The Court found that the negligence of the company's servants was not willful, saying: "There was evidence that the cheeses were packed the wrong way, and that there were too many of them in the truck. This might have been evidence

of willful misconduct if it had happened in Cheshire, where the porters are probably accustomed to pack cheeses of this sort and know their peculiarities; but there is in this case no evidence that brings home to the defendant's servants any knowledge that what they were doing was likely to result in damage."

"In this case," said another of the judges, "there were these facts known to both parties: The defendants had two rates—one at carrier's risk and one at owner's risk. Both parties knew what was the meaning of 'owner's risk,' namely, that the defendants were to be absolved from liability unless the damage arose from willful misconduct of their servants. Now is this a 'just and reasonable' condition? I am of opinion that it is."

The other judges being of the same opinion the judgment was in favor of the carrier.

There have been no adjudications, so far as we know, in which the word "released" obtains a particular definition; but we can safely define it ourselves as having no wider or different interpretation than the phrase "owner's risk."

Limited Passage Ticket.—Good if the Trip is Begun During the Limited Time, though not Completed until after its Expiration.—Right to Enter Train at Intermediate Point.—Auerbach was the holder of a coupon ticket good for a passage from Buffalo to New York, to be used on or before the 26th of the month. He entered a train at Rochester on the 26th, and his ticket was accepted and punched. When, however, he had reached Hudson it was about three or four o'clock on the morning of the 27th, and the conductor refused to recognize the ticket any further. A, refusing to pay additional fare, was ejected from the train. He sued and recovered damages, the Court of Appeals holding that the ticket was "used" on the 26th, within the meaning of the contract, and that the contract did not require the passage to be completed on that date. It was also held that the passenger had the right to begin his trip at Rochester, an intermediate point, instead of Buffalo, the initial point. (Auerbach v. N. Y. C. & H. R. R. R., April, 1882.)

Live Stock Shipments.—Negligence.—Burden of Proof.—Limiting Liability.—Mistake by the Consignor.—A railroad company engaged in the transportation of live stock, and accustomed to furnish suitable cars therefor, upon reasonable notice, and holding itself out to the public generally as a common carrier, upon the terms and conditions provided in a special contract with shippers, is a common carrier of live stock, with such restrictions on its common law liabilities as are embodied in such contract. (Wisconsin,) (Ayres v. Chicago & N. W. Ry. Co., 37 N. W. Rep., 432.)

Where a shipper applies to a company, a common carrier of live stock, for cars to be furnished, at a time and station named for transportation of stock, it is the duty of the company to inform the shipper within a reasonable time whether it is able to furnish such cars as required, and if it fails to give such notice, and the shipper, relying upon the conduct of the company, has his stock at such place on time, and no cars are there for their transportation, such company is liable to such shipper for damages. (Id.)

In an action against a railroad company for delay in transporting plaintiff's stock to market, arising from their failure to have cars at a certain station at an agreed time, it appeared that such stock arrived in Chicago on Friday, in time for the Saturday market, but plaintiff did not sell such stock, but kept them over Sunday. Held, that there could be no recovery for any expense of keeping such stock, their depreciation in value, or their shrinkage in weight, after Saturday. (Id.)

In an action against a railroad company for failure to have stock cars at certain stations, at a certain time, the ability of such company to so furnish such cars with ordinary diligence upon the notice given, was, according to the exigencies of transportation, peculiarly within the knowledge of such company and its agents, and the burden of proving its inability to do so was on defendant.

When live stock is shipped upon a railroad under a contract limiting the carrier's responsibility, and by agreement the consignor travels upon the same train, and feeds and takes charge of the animals in transit, the burden of proof is

on him, in suit against the company for loss of any of such animals, to show that the default or negligence of the company was the cause of the loss. (St. Louis, &c., R. R. Co. v. Weakly, 8 S. W. Rep., 134.)

When a railroad freight contract, limiting the company's responsibility to that of a private carrier for hire, is signed by the parties in duplicate, and one copy thereof kept by the consignor, the fact that he signed it under a mistake as to its contents, not having read or heard it read, does not, in the absence of fraud or imposition by the company in procuring his signature thereto, relieve him from the effects of the contract after it has been acted upon by both parties. (Same case.) (St. Louis, &c., R. R. Co. v. Weakly, 8 S. W. Rep., 134.)

Injuries to Live Stock.—1. Injuries to cattle in shipping resulted from the act of the owners in overcrowding the cars, and also from acts of the carrier. The jury in the action against the carrier, having been instructed that plaintiffs were not entitled to recover for damages resulting from overcrowding, rendered a general verdict for plaintiffs in a sense not greater than the damages claimed as resulting from act of the carrier. Held, that the jury, in estimating damages, considered only such facts as, under the charge, would fix liability on the carrier. (Houston & T. C. Ry. Co. v. Hester, (Texas,) 7 S. W. Rep., 776.)

2. In an action for damage to cattle in shipping on the ground of unreasonable delay and improper operation of the train, evidence that the cattle were shipped on a way train, which necessitated many stops, is admissible, though defendant made no contract not to ship on such train, nor to transport at a given rate of speed; and evidence of rough handling of the train, and that injury resulted from the jerking in stopping and starting so often, is competent to show carelessness. (Gulf, C. & S. F. Ry. Co. v. Ellison, (Texas,) 7 S. W. Reporter, 785.)

Delivery of Freight.—Under General Laws of Texas, 17th Coll. Leg. Sess., § 2, p. 35, requiring a railroad company to deliver up the possession of goods to the owner or consignee on payment of freight charges as shown by the bill of lading,

and prescribing a penalty for a refusal so to do, a railroad company has no right to impose as a condition the surrender of the bill of lading, where the goods have been hauled over connecting roads, and the freight charges as shown by the way-bill are greater than those in the bill of lading, any custom to the contrary notwithstanding. (*Dwyer v. Gulf, C. & S. F. Ry. Co.*, (Texas,) 7 S. W. Reporter, 504.)

Delay in Transportation.—Agreement for Notice.—Validity.—What Answer must Show.—Of Live Stock.—Negligence in Caring for Cattle.—Instructions.—1. A railroad company is liable for delay in transporting cattle accepted by it for carriage, regardless of a special contract made with the shipper limiting its liability to injuries resulting from willful negligence following. (*Missouri Pac. Ry. Co. v. Cornwall*, (Texas,) 8 S. W. Rep., 312; *Railway Co. v. Harris*, 2 S. W. Rep., 574.)

2. Whether an agreement between a railroad company accepting cattle for shipment beyond its line and the shipper, requiring the latter, as a condition precedent to his right, to recover for any loss or injury, to give notice to some officer of the company or its nearest station agent, before the removal of the cattle, is reasonable, and therefore binding on the shipper, depends upon whether the company had an officer or agent to whom notice could be given near the place of delivery; and see answer in an action against the company, setting up such contract, but making no allegation upon this latter subject, is bad on demurrer.

3. In an action by a shipper against a common carrier for negligence in transporting cattle, the court properly refused to instruct the jury that "if any cattle were injured, or had died from the effects of being overheated on account of hot weather, then plaintiff could not recover," the jury having been instructed that defendant would not be liable for any loss not caused by want of care, and there being evidence of negligence by defendant in watering the cattle, such instruction might tend to mislead the jury by eliminating the condition of the weather in determining the question of want of care by the defendants in supplying the cattle with water.

CHECKS.

Payment of Check Cannot be Rescinded on Drawer's Order.—Check Charged to Drawer's Account is Paid.—A somewhat novel case was that of a Missouri bank, which after having charged a check to the drawer's account, and cancelled it, undertook on the drawer's order to retrace their steps. The facts were that A. McG. & H. made their check on the Commercial Bank, payable to C. & Co., who passed it to B. L. & Co. The next day in the forenoon, it came to the Commercial Bank through the clearing-house, was checked from the clearing-house file, and charged to the account of A. McG. & H. Afterwards, on the same day, a member of the latter firm notified the bank not to pay the check. The cashier then wrote upon it "cancelled by mistake," erased the charge upon the books, and handed the check back to B. L. & Co.'s manager, who gave in exchange some checks and some money. B. L. & Co. at once notified the bank that they would not receive the check, but nevertheless began suit on it against the drawers. They also filed a complaint before the clearing-house committee, which determined that the bank should pay the check. Accordingly the bank paid it, and again charged it to A. McG. & H.'s account. The latter having had no notice of the proceedings before the clearing-house committee, immediately sued the bank, and got judgment. On the principal point in the case the Supreme Court said:

"A customer of a bank has the right to countermand the payment of a check before it is paid, and take upon himself the consequences of such act. But he has no right to recall the check after it has been paid to one who took it in good faith and for value, nor can his banker do so for him. When timely notice not to pay is given, the burden of proof is with the bank to show that payment has been made. If the bank receives the check, pays the money or its equivalent to the holder, cancels and charges up the check to the maker, such acts must be regarded as payment, and this payment cannot

be rescinded without the consent of the person to whom payment of the check was made."

On the point whether B. L. & Co. had not by suing A. McG. & H., after the check had been returned to their manager, assented to the bank's rescission of payment, the court said—"When the check came to B. L. & Co. it bore the evidence and assertion of the defendant's 'cancelled by mistake,' when in fact it had not been cancelled by mistake at all. They declined to relieve the defendant, (the bank), but at the same time sued the plaintiffs, (A. McG. & H.) Now if they did not assent to a rescission of the payment, of which there was but little or no evidence, so far as the defendant is concerned, they had a right to retrace that step when informed of the real facts in the case. * * * * * If there was any rescission of the payment it could only be valid when made or acquiesced in after knowledge that the check had not been cancelled by mistake." (Albers v. Commercial Bank, 85 Mo., 173.)

Check Payable to False Order.—Indorsement in Assumed Name Passes Title.—A person calling himself Charles Barney took stolen goods to Coleman and another, who paid him the proceeds in a check drawn to his order, using the name given. Coleman thought the person was Charles Barney, of Swanzey, an individual in existence, when in fact the name was merely an *alias*. The false Charles Barney indorsed the check by his assumed name, to Robertson, who took it in good faith, for a valuable consideration. C. discovering the fraud immediately stopped payment, and R. thereupon sued him, and obtained judgment. The Supreme Court expressed the following views—"It is clear, from these facts, that although the defendants may have been mistaken in the sort of man the person they dealt with was, this person was the person intended by them as the payee of the check, designated by the name he was called in the transaction, and that his indorsement of it was the indorsement of the payee of the check by that name. The contract of the defendants was to pay the amount of the check to this person or his order, and

he has ordered it paid to the plaintiff." (Robertson v. Coleman, 141 Mass., 231.)

But if Indorsement does not Pass Title the Drawers are Estopped from Denying Title of Bona Fide Holder.—William Mara, having assumed the name of Charles Clark, bought a quantity of nutmegs of the firm of W. D. & Co., in Canada, smuggled them into the United States, and sold them through C. H. & Co., who remitted the proceeds to him in a bill indorsed to the order of Charles Clark. It was then passed in that name for a valuable consideration to W. D. & Co., and by the latter transferred in the course of business to another party. The latter was forced to bring suit in order to enforce payment, and the questions that were raised were, whether the indorsement to and from Mara under the false name of Clark conveyed title to the indorsee, or if not whether the firm of C. H. & Co. were not estopped from denying that the title so passed. The Supreme Court thought it unnecessary to resolve the first question, because an affirmative answer to the second was decisive of the case. "Suppose," said the Court, "C. H. & Co. in the presence of W. D. & Co. had indorsed the bill to 'Charles Clark,' and delivered it to William Mara, saying this is the amount due you on account of your nutmegs, and Mara had then and there indorsed and delivered it to W. D. & Co. The case would have been on all fours with the present; and we think that under such circumstances, W. D. & Co. might well have relied upon the conduct of C. H. & Co. as a representation that Mara's name was Clark, although they had no interest in the transaction between them. It must be kept in mind that C. H. & Co. thus put in circulation a negotiable security, and invited the world to give it credit. We cannot resist the conclusion, that the indorsement by C. H. & Co. to Charles Clark, and their delivery as part of the same transaction, must be regarded as an affirmation to all persons not otherwise informed, that there was such a person as Charles Clark, and that Mara was that person." (Forbes v. Espy, 21 Ohio St., 182.)

Irregular Form of Check.—Though Drawn in Duplicate, like a Bill of Exchange, it Still Remains a Check.—Ritzinger & Co., were holders by indorsement of the following instrument:

TWO THOUSAND DOLLARS.	\$2,000.	State of Indiana.	Original.
		BANKING HOUSE	
		OF	
		A. & J. C. S. HARRISON.	
		INDIANAPOLIS, July 15, 1884.	

Pay this our first check (second unpaid) to the order of William Haerle, Two Thousand Dollars.

To Merchants National Bank, Chicago, Ill.

No. 130,263. A. & J. C. S. HARRISON.

The paper was presented for payment on the 28th day of July, 1884, but the Harrisons meanwhile having failed, the Merchants Bank applied their balance to the discharge of a note not yet due, on which they were indorsers, and refused payment of the check or bill of exchange held by Ritzinger & Co. The latter's right to the fund on deposit turned on the question whether the paper was a bill of exchange, on which they could have no demand against the bank without previous acceptance, or a check, which under Illinois law gives the payee the right to sue and recover from the drawee in his own name, and an assignment whereof carries to each successive holder the legal title to so much of the drawer's deposit as the check calls for.

The Illinois Supreme Court took the view that the paper was a check, and said—"The only reason why this instrument is not a check is the fact that it contains the words "original" and ("second unpaid.") These, it is contended, make its payment conditional. We cannot concur in this view. The practice of making more than one copy of an instrument ordering or requesting the payment of money, we concede, is generally confined to foreign bills of exchange; but there is nothing, in our opinion, in the purpose or effect of that practice which should render it inapplicable, under all circumstances, to checks. The purpose is to guard against loss or question in case of miscarriage—the chances of the bill reaching in due season the party to whom it is transmitted being increased by the number of copies; but this does

not render the instrument a conditional one in any sense. The whole of the sets constitute in the law, but one bill, and therefore payment, or cancelling of either of the sets is a discharge."

The holders of the papers were held, therefore, to be entitled to payment out of the funds held by the Merchants Bank at the time it was presented, and wrongfully applied by the bank to the discharge of a contingent indebtedness of the Harrisons not yet due. (Merchants National Bank v. Ritzinger, 6 Western Reporter, 340.)

Whether Check is an Assignment of the Fund in Bank.—Can Check-Holder Enforce Payment.—Conflicting Adjudications.

—The United States Supreme Court, in the case of the Laclede Bank v. Schuyler, decided October term, 1886, (120 U. S., 511,) said—"The question of how far and under what circumstances a check of a depositor in a bank will be considered an equitable assignment to the payee of the check, of all or any portion of the funds or deposits to the credit of the drawer of the check in the bank, is one which has been very much considered of late years in the courts, and about which there is not a unanimity of opinion. In this court it is very well settled that such a check, unless accepted by the bank, will not sustain an action at law by the drawee against the bank, as there is no privity of contract between them. But while this may be considered as the established doctrine of this court in regard to the rights of the parties at law, and is probably the prevailing doctrine in nearly all the courts, it is urged in this case, and several respectable courts have so decided, that such a check is an appropriation of the amount for which it is drawn of the funds of the drawer in the hands of the bank." Under the latter head the following Iowa, South Carolina, Illinois and United States Circuit Court decisions are cited: Roberts v. Austin, etc., 26 Iowa, 315; Fogaties v. State Bank, 12 Rich. (S. C.) Law, 517; Munn v. Burch, 25 Ill., 32; German Savings Inst. v. Adae, 1 McCrary C. C., 501.

In the United States Supreme Court, cited at the beginning of the section, the question upon a check dated October 20th,

drawn by Israel & Co. upon the Laclede Bank, in favor of Shuler, and presented October 26th. Payment was refused, on the ground that Israel & Co. had, on October 24th, made an assignment under the laws of Texas for the benefit of their creditors, and notified the bank as follows: "We assigned this day in favor of S. Davidson; hold funds subject to his order." The Circuit Court decreed that the bank must pay the check, holding that it operated in equity as an assignment *pro tanto* of Israel & Co.'s funds in bank, prior and superior to the general assignment. The Supreme Court reversed the decree, saying that however the doctrine that the doctrine of an assignment by the drawing of a check "may operate to create an equitable interest in the fund deposited in the bank to the credit of the drawer after notice to the bank of the check, or presentation to it for payment—a question"—said the Court parenthetically, "which we do not here decide—we are of opinion that as to the bank itself, the holder of the fund, and its duties and obligations in regard to it, the bank remains unaffected by the execution of such a check until notice has been given to it or demand made upon it for payment. In the case before us it is a conceded fact that before the bank had any knowledge or notice whatever of the check on which the plaintiff brings this suit, it had received a distinct notification from the drawer of that check that he had made a general assignment for the benefit of his creditors, with an express direction to hold the funds subject to the order of the assignee. Therefore, even if the check could be considered as an attempt on the part of C. W. Israel & Co. to assign or appropriate this amount in the hands of the bank to Shuler, the general assignment for the benefit of all their creditors of all their assets, including those in the hands of the bank, was made and brought to the attention of the bank with directions to turn them over to the assignee before it had any notice of the check in favor of Shuler."

Forged and Altered Checks.—The general rule being that a bank cannot charge its depositor with payments made on his account, except upon a genuine check or other order signed by him, it becomes of importance to know the exceptions to

this rule, One of these occurs when the customer's check is fraudulently "raised" by a confidential employee, in repeated instances, and the depositor, through negligence in examining his pass-books, permits the fraud to continue. An exception of this kind is noted *ante* (or *post*) pp.

Another instance occurs under the following circumstances :

If One Pays a Forged Note Purporting to be Made by Himself, he Cannot Recover Back the Money.—A note purporting to have been made by R. B. Johnson, payable to the order of Philip Metzner, was negotiated by the Commercial Bank of Wheeling, and carelessly paid by Johnson, without seeing it, and so without discovering that his supposed signature was a forgery. There was nothing to prevent his seeing the note and making the discovery in time. He thought, however, that he ought to get the money back, as it had been paid under mistake, and the bank holding a different opinion the question was litigated, and the Supreme Court agreed with the bank. The court said :

"It seems to us, from a review of the authorities, that it is a rule of commercial law too firmly established to be shaken, being sustained by an unbroken line of authorities for more than a century, that the drawee of a bill of exchange is presumed to know the handwriting of the drawer, and *a fortiori* the maker of a negotiable note is presumed to know his own signature, and if the drawee accepts and pays the bill, or the maker pays the negotiable note in the hands of a *bona fide* holder, to which the maker's name has been forged, he is bound by the act and cannot recover back the money so paid.

* * * Johnson was clearly guilty of negligence in paying the note, and he cannot throw the loss on the Commercial Bank, which was without fault in the premises. He not only did not examine the note before he paid it, but did not examine it for several days afterward, and did not seem to be certain it was a forgery until he had examined the books of the Riverside Furniture Company. This was on the ninth day of April, seven days after he had paid the note."

On the point of negligence, however, it would seem that the decision would have been the same if greater diligence had

been used, the court saying that the law imputes negligence, without special proof, to the person who pays forged paper under such circumstances. (*Johnson v. Commercial Bank*, 27 W. Va., 343.)

If the Signature is Genuine, but the Amount Fraudulently Altered, the Bank is Protected.—Among the authorities relied on by the court in making the decision just cited was the well known New York case of *National Bank of Commerce v. Banking Association*, 55 N. Y., 211, where it was held that the drawee of a check is bound to know the signature of the drawer, but as to the filling he is not bound. Therefore if a bank pays a check for \$2, bearing the genuine signature of its depositor, but altered by forgery after signature so as to call for \$200, or \$2,000, and the bank has no notice of the fraud, the law, particularly that of New York, will allow the full amount to be charged to the depositor's account. The decision to this effect is of so much importance, and has been so much criticised, that it is worth while to recite some of the particulars under which it was given.

Check.—Effect of Usage.—Clearing-House.—The following, though not a recent case, is important:

1. Without stating in the declaration that the association called "clearing-house" is an institution authorized by special legislation, or any authority existing in such association, in any way, to alter or modify the law merchant in regard to checks or commercial paper, such association cannot be held to have power to make usages or rules to bind those who are not parties to its organization.

2. Its usages and rules, if not in conflict with law, may, by the implication of tacit adoption in the contracts of members, bind them in the same way that a general usage of trade may bind those who deal with reference to it, and who are therefore held impliedly to adopt it. But those who are not bound by such usages, and have not contracted with reference to them, have no right to avail themselves of them to create an obligation against those who are parties to their adoption, and bound by them *inter sese* only.

3. Customs and usages in derogation of the common law must be strictly pleaded, and when well pleaded the count must show a case clearly within the usage.

4. Whether a failure to return a check (when sent to the bank on which it is drawn) in a reasonable time amounts to an acceptance, must always depend on the particular circumstances of each case. A failure to return is not of necessity an acceptance; they are not convertible terms.

5. In order that a promise to accept a bill shall amount to an acceptance, the holder must have taken the bill on the faith of the promise, and until such negotiation there is no acceptance; it amounts to nothing but a contract between the drawer and drawee collateral to the bill, which, like all other contracts, must have a consideration to support it.

On demurrer to declaration.

The opinion of the court was delivered by the Chief Justice.

This is a special action on the case against the defendant, upon whom Andre & Brother had drawn a check, dated October 29th, 1859, for \$2,730.

The case is before us upon demurrer to the plaintiff's declaration. The defendant has taken issue on the first and fifth counts of the declaration, and demurred to the second, third, and fourth counts.

The difference in the frame of these three counts will render an examination of each necessary to the proper decision of the case.

The second count, after alleging the drawing of the check, and its delivery to the plaintiff, who was its payee, proceeds to state that at that time it was, and ever since has been the established rule, use, and custom of the association of banks, called the "clearing-house" of the city of New York, and of all the banks of the city and elsewhere belonging to and connected with the clearing-house, and of the defendants, that any check drawn upon any one of the said banks, and received in payment or for collection, of any other of the said banks, and presented by the bank receiving the same through the clearing-house to the bank against which the said check was

drawn, should be returned, if not paid, to the bank presenting the same for such payment on the same day on which it was so presented, or at furthest early on the morning of the day after the said presentation for payment and before the commencement of the business hours of that day, or in default thereof, that the said bank thus failing to return the said check should be liable to the holder thereof to pay the amount of the check, whether having funds of the drawer or not. The count then states that the Ocean Bank and Bank of Commerce were both members of the clearing-house, and had assented to and were bound by the rules and usages set forth; that the Ocean Bank had been appointed, and was the agent of the defendant to redeem its bills and pay drafts on it at the banking house of the Ocean Bank in New York, and to receive and return through the clearing-house drafts and checks drawn on the defendant, in conformity to the rule of the clearing-house just stated; and that the Ocean Bank had for a long time so done business with and for the defendant, and that the defendant had for a long time conformed to the said usage, and agreed to be bound by it; that the plaintiff on the 29th of October, 1859, deposited this check for collection with the Bank of Commerce, which bank, on the 31st, the 30th being Sunday, duly presented the check, and demanded payment thereof of the defendant, through its agent, the Ocean Bank, at the clearing-house in the city of New York, according to the usage stated as that of the New York banks and of the defendant, and that the defendant retained the said check, without notice of non-payment, from that time until the second day of November, when it returned the same to the Bank of Commerce with notice of non-payment; that Andre & Brother failed on the first of November; that by reason of the neglect to return the check in time, the plaintiff has lost the money.

It will be observed that the count does not state directly the existence or mode of organization of the association called the "clearing-house," nor does it show whether it is an institution authorized by special legislation, or merely a private organization. No authority is shown to exist in the

association, in any way, to alter or modify the law merchant in regard to checks or commercial paper.

Such an association can have no power to make usages or rules to bind those who are not parties to its organization. Its rules and usages, if not in conflict with law, may by the implication of tacit adoption in the contracts of members, bind them in the same way that a general usage in trade may bind those who deal with reference to it, and are therefore held impliedly to adopt. (*Robeson v. Bennett*, 2 Taunt., 308; 1 Parsons on Con., 229.)

But those who are not bound by such usages, and have not contracted with reference to them, have no right to avail themselves of them to create an obligation against those who are parties to their adoption, and bound by them *inter sese* only.

It is manifest that the usage and rules set up in the count were adopted by the associated banks for their own convenience, and to facilitate the transaction of business and avoid the trouble and expense of special messengers to demand payment of checks, bills, and notes, and not for the purpose of enlarging the rights of the holders of commercial paper who are not members of the association. It was a rule, designed to operate strictly among themselves for their own convenience in the dispatch of business.

Neither the plaintiff nor the defendant were members of the association, nor does the declaration state that the plaintiff, when he left the check with the Bank of Commerce, knew of the existence of the usage, or in any way modified his contract with that bank for the collection of the check so as to embrace the benefit of the usage for himself.

If the Bank of Commerce, in pursuance of the usage, had a right to hold the Ocean Bank for a failure to comply with its terms, could not that bank relieve the Ocean Bank of such liability without incurring any to the plaintiff? It could do so, for the manifest reason that this usage, in contravention of the common law, formed no part of the contract between the plaintiff and the Bank of Commerce. It could not, unless adopted and sanctioned by both the parties, be binding on both.

That the Bank of Commerce, in the collection of the check, acted as agent of the plaintiff can make no difference. This fact would not bring the case within the operation of the rule, that the principal is entitled to the benefit of the contract of the agent, while transacting the business of the principal.

This is undoubtedly true as to all the legal rights acquired by the agent for the benefit of the principal; but we have already said that this was a mere labor-saving usage, designed for the exclusive benefit of the agent, the adoption of which could not affect the principal without his assent.

If the Bank of Commerce had omitted its duty in the presentation of the check in due time, so that by the failure of the defendant the plaintiff had lost his money, it would have been responsible to the plaintiff for that neglect.

That is not the allegation here; but the insistment of the plaintiff is, that his agent, the Bank of Commerce, and the defendant's agent, the Ocean Bank, had an arrangement, or were parties to one, by which the defendant was to be responsible for the amount of the check if the Ocean Bank did not return it to the Bank of Commerce on the same day it was presented to the Ocean Bank, or the next morning before ten o'clock.

The usage is defectively set forth in the count, if the meaning of the pleader was to state that this check was to be left, by the presenting bank, with the bank on which it was drawn, or its agent. It is supposed that was the intention of the pleader.

It would be impossible for a bank upon which a check was drawn, to return it by a given time, if it were not left in the possession of that bank; if merely presented by the collection bank without parting with the possession, no return would be possible; nothing could happen in case of non-payment but a mere refusal to pay.

If, therefore, that was the usage, and it was so set forth in the count, it is defective in not setting forth that the check was delivered by the Bank of Commerce to the defendant, or its agent, the Ocean Bank.

The declaration is defective in not setting forth the usage

intelligibly. As it is set forth, it is absurd; and if it were set forth, as I have supposed it was intended to be, the usage was not complied with.

Customs and usages in derogation of the common law must be strictly pleaded; and when well pleaded, the count must show a case clearly within the usage. If a case can be conceived calling for the application of the rule, it is the present, where it is attempted to make the defendant liable, by mere force of usage, to pay a check of a drawer without any funds of his in its hands.

The usage pleaded is, that when a check is presented at the clearing-house, *to a bank against which the said check was drawn*, then if not returned within the same day, or the next, before ten o'clock, the bank on which it was drawn shall be liable.

It does not cover the case of a presentation to an agent. The presentation must be *to the bank on which it was drawn*. This is an essential difference. For such a purpose, the agent does not represent the principal. The usage, if contemplating a presentation to the principal, may be reasonable, and very unreasonable if extending to the agent. The plaintiff has failed to bring his case within the usage.

This count cannot be supported upon the ground that the facts alleged show an acceptance independent of the usage. The count does not show that the check ever was in possession of the defendant; if not, there could be no failure to return it so as to make the defendant liable. Whether a failure to return a check (when sent to the bank on which it is drawn) in a reasonable time amounts to an acceptance, must always depend on the particular circumstances of each case. (*Jeune v. Ward*, 2 Starkie, 326, and cases there cited.)

A failure to return is not of necessity an acceptance; they are not convertible terms. It may or may not be; there may be a sufficient excuse for the failure. If the plaintiff relied on an acceptance, he should have stated it, as he has done in the first count.

The third count alleges the drawing of the check in New York, as in the second, by the same persons, and its delivery

to the plaintiff and the existence of a usage of the defendant to receive, through the Ocean Bank of New York, demand of payment of checks drawn upon defendant in New York; that the Ocean Bank was its agent for that purpose, and that it was the usage and agreement between that bank and defendant that all checks on it in New York, or used there and presented to the defendant through the Ocean Bank, which should not be returned to the holders thereof on the same day, or the day after before ten o'clock in the forenoon, should be paid by the defendant (without saying to whom); that the plaintiff, relying on the said usage and agreement between defendant and the Ocean Bank, presented this check, on the 31st of October, 1859, to the Ocean Bank for payment; that that bank, on the same day, presented it to the defendant for payment; that defendant received the check from the Ocean Bank on that day, and that the defendant did not return the same to the plaintiff, the holders thereof at that time, either on that day or the next, before ten o'clock in the forenoon, and that by means thereof and by force of the agreement between the Ocean Bank and the defendant, and by force of the statutes of New York, the defendant became liable to pay the amount of the check to the plaintiff.

The plaintiff's action on this count is not for a breach of a promise to accept the check, and pay it—not for an acceptance,—but is founded entirely on a usage and agreement between its agent, the Ocean Bank, and the defendant, to pay all checks drawn or used in New York on the defendant, and presented to it through the Ocean Bank, unless returned the same day or the next before ten o'clock in the forenoon. The count does not allege that defendant had any funds of the drawer, or that the plaintiff sustained any special damage by the failure to return the check.

The plaintiff avers that he was the holder of the check at the time of presentation, and that he presented it to the Ocean Bank, who at the time was the agent of the defendant, to receive demand of payment.

Under this state of facts, the plaintiff shows no interest in the contract on which he counts. He shows himself as a

stranger to it in every sense. The Ocean Bank is not his agent, but that of the defendant; he can claim no benefit of a contract between the defendant and its agent. As a contract, it is *nudum pactum*; no consideration is shown as passing either from the Ocean Bank or the plaintiff.

Upon what possible grounds can the plaintiff claim the right to enforce a promise, for which there was no consideration, to the terms and parties of which he is a stranger? As was remarked in regard to the last count, the facts pleaded are not equivalent to an acceptance.

The fourth count states the making and delivery of the check; the agency of the Ocean Bank for the defendant; the established usage of the defendant to pay checks on the defendant presented at the Ocean Bank, if not returned as above stated; that the plaintiff was cognizant of the usage; that he presented the check at the Ocean Bank, and demanded payment; that defendant, through that bank as its agent, received the check, took possession of it, and promised the plaintiff to pay it if not returned as above stated; that it was not returned, and has not been paid; that Andre & Brother, the drawers, became insolvent on the first day of November, after ten o'clock, and before the check was returned.

The attempt in this count is to charge the defendant with the check on the footing of an express contract between the plaintiff and defendant to pay the check, if not returned within the given time.

If this is to be treated either as a promise to accept or a promise to pay it cannot avail the plaintiff. No consideration to support the promise is stated or appears. It is not the case of a check taken on the faith of such a promise. The holder gave nothing for the promise—relinquished no advantage—nor did he take the check because the drawers had made any absolute or conditional promise to pay it. The drawers never did accept it, nor did their agents.

All the cases which hold that a promise to accept a bill amounts to an acceptance, put the doctrine on the ground that the holder has taken the bill on the faith of the promise; that until such negotiations there is no acceptance, nothing

but a contract between the drawer and drawee collateral to the bill, which, like all other contracts, must have a consideration to support it. (Mason v. Hunt, Doug., 297; Pierson v. Dunlop, Cowp., 571; Coolidge v. Payson, 2 Wheat., 66; Johnson v. Collings, 1 East., 98; Clark v. Cock, 4 East., 57; Schimmelpennich v. Bayard, 1 Pet., 284; Boyce v. Edwards, 4 Pet., 111; Russel v. Wiggins, 2 Story's C. C. Rep., 237; Adams v. Jones, 12 Pet., 207; Carrigus v. Morrison, 2 Metc., 381.)

I can find nothing in this case to distinguish it from that of a contract without consideration, and therefore *nudum pactum*.

The three counts demurred to are all defective.

Judgment for demurrant. (Overman v. The Hoboken City Bank, New Jersey Supreme Court, 30 N. J. Law Rep., 61.)

CONTRACTS.

Particular Forms Construed.—Duration of Engagement, where no Term is Specified.—An agreement, dated December 9, 1881, between the B. & W. Co., boiler-makers of New York, and one Moore, "in regard to selling boilers in Baltimore and vicinity," contained the following terms:

"Mr. M. to open an office in Baltimore to represent the B. & W. Co., and work for their best interest in every thing. On all sales made by him, he is to take charge of erecting, and collecting money and remit the same to us; all contracts to be subject to the approval of home office. The B. & W. Co., to pay office rent and incidental expenses of same, necessary traveling expenses and \$25 per week to Mr. M., charging the same to Baltimore office; five per cent on all sales by Mr. M. to be credited to Baltimore office, and any surplus credits at end of year to be paid to Mr. M."

It will be observed that the engagement was for no particular term, but the Court of Appeals held that it must be construed as continuing for a year, and the company had no right to terminate it within a shorter period because the sales did not answer their expectations. (Babcock v. Moore, 62 Md.)

What Contracts Must be in Writing.—An Agreement to Purchase Land is Invalid Unless in Writing.—B. agreed with McK. to purchase certain plaster mills and property connected therewith, to take the deed in their joint names, both to join in securing payment, and McK. to give B. \$5,600 for a copartnership with him in the property and business, sharing equally with him therein. The arrangement was carried out, except that McK. never paid or gave any written promise to pay the \$5,600. B. sued to recover this sum. The facts, as stated, were in part disputed, B. and McK. flatly contradicting each other as to the promise to pay \$5,600. The court, however, thought it immaterial whether the promise was made or not; if it was, it was a contract for the purchase of land, and should have been in writing. Judgment for McK. was therefore affirmed. (Brosnan v. McKee, 30 North-Western Reporter, 107; Mich. Sup. Court, Nov. 4, 1886.)

Reformation of Contract.—Right Lost by Long Delay.—Lease Dated on Sunday.—Presumption and Effect of Delivery.—Lucy A. Hoard leased to David F. Stone, a small parcel of land, and ten years after had occasion to bring an action to reform the instrument so as to express the real agreement of the parties. The court denied the particular amendment sought, partly on the ground that she was informed of the defect ten years before, and partly because she had not clearly proved her right to it but granted a reformation of the instrument in another respect, where its faulty character was not discovered till several years later. The lease bore date the 14th of April, 1872, and it was remarked—"The Court will take judicial notice that this was Sunday, although no mention of the fact is made by either party. On the 7th of January, 1873, the execution of the lease was duly acknowledged by complainant, and was afterwards recorded, and it may be considered as having been delivered and as taking effect from the date of the acknowledgment." (Hoard v. Stone, 58 Mich., 578.)

Acceptance Without Notification.—No Contract Formed.—A. offered to sell B. some timber on specified terms. B. made a

conditional acceptance, the condition being that he could get his brother to assist him. He was successful in this respect, but did not notify A., who subsequently sold the timber to C. B. claimed damages, but it was held by the Supreme Court that in order to complete the contract he should have notified A. that he had engaged his brother's assistance, and thus removed the condition upon his acceptance. (*Beckwith v. Cheever*, 21 N. H., 21.)

Acceptance, Varying from the Terms of Offer.—No Contract.

—1. A., in a letter to B., offered to sell him a cargo of "good" barley. B. replied—"Such offer we accept, expecting that you will give us *fine* barley and full weight." A. wrote back—"You say you expect we shall give you *fine* barley. Upon reference to our offer you will find no such expression. As such, we must decline shipping the same." B. claimed the barley, and though it was shown that there was a difference in quality between "good" and "fine" barley, a jury agreed with him. But the court held that there was a variation between the offer and the acceptance, and consequently no mutual assent, and therefore no contract. (*Hutchinson v. Bowker*, 5 M. & W., 535.)

2. A. offered his farm to B. for £1,000. B. offered to take it at £950. A. declined, whereupon B. said he would take it at £1,000, but A. now refused that sum. B. insisted that the first offer was open for his acceptance, and that by it the contract of sale was complete. It was held by the court, on the contrary, that B.'s offer of £950 was a rejection of the £1,000 offer, that there had never been an agreement upon the same terms at the same time, and consequently there was no sale. (*Hyde v. Wrench*, 3 Bear., 334.)

Insufficiency of Written Memorandum.—Writing must Show all Material Terms of the Agreement.—The Iron-Clad Can Co., by their representative, H. W. Shepard, made an oral agreement with John Drake to employ him as salesman for a term of three years. Shepard gave him a note in the following terms:

{*Preserve this.*}

MEMORANDUM IRON-CLAD CAN CO.

Two thousand dollars for first year.

Two thousand and five hundred dollars for second year sure, and provided the increased sales shall warrant it, he is to have \$3,000.

Third year in proportion to business as above.

IRON-CLAD CAN CO.

H. W. SHEPARD.

Drake sent the following acceptance:

UTICA, Jan. 12, 1875.

Iron-Clad Can Co., or H. W. Shepard:

I accept your proposition of the 9th inst., and will be in New York on Monday to commence operations.

JOHN DRAKE.

Before the expiration of the term of three years named, Drake was dismissed, and holding himself ready to continue in the company's employment during the unexpired portion, at the end of it sued them for his salary. Judgment went against him in the Supreme Court, on the ground that his course of action rested upon a contract which, by its terms, was not to be performed within one year, and which was rendered void by the statute of frauds for the want of a sufficient note or memorandum. On the appeal it was contended that the memorandum was sufficient, for the double reason that no integral or material part of the agreement was omitted, but if it was the omission was only of the consideration, which under the New York statute of frauds, it was argued, no longer needs to be expressed. The Court of Appeals noticed at some length the several statutory changes in the New York law on this point, and the variant interpretations adopted by the courts, and went on to say—"But whatever else may be said of the amendment of 1863, we are quite sure that it cannot be understood to destroy and annul the requirement that the note or memorandum must contain all the substantial and material terms of the contract between the parties. It must show on its face what the whole agreement is so far as the same is executory and remains to be performed, and rests upon unfulfilled promise. * * * * The actual agreement was that the defendant would pay yearly the sums specified in the memorandum for the services of the plaintiff as a salesman, to be rendered for three years,

and the inquiry is, whether that contract is stated in the memorandum. * * * On the face of this writing the contract of the defendant with its essential terms and conditions does not at all appear. * * Its language is equally applicable to many contracts entirely different from that actually made. Although the plaintiff is a salesman, he may have invented or purchased a patent valuable for the use of the defendants, and bargained to give them that use for three years, in return for which plaintiff was to have '\$2,000 for the first year, \$2,500 for the second year sure, and provided the increased sales shall warrant it he is to have \$3,000.' * * Or the plaintiff may have rented to the defendants a store or factory for three years, and the memorandum recited the rental. And so the illustrations might be multiplied. Nothing in the writing indicates which of all the possible contracts was intended, or identifies the one really made. To a person depending wholly upon the writing, the real contract made is impossible to be ascertained." The judgment of the Supreme Court was therefore affirmed. (Drake v. Seaman, 31 A. L. J., 174.) (1884.)

Insufficient Memorandum of Sale of Land.—One Johnson made a contract to purchase certain land of one Pulsifer, for the sum of \$500, and paid \$300 down, receiving in return the following memorandum:

BEAUMONT, Dec. 22, 1860.

Received of Core Johnson, three hundred dollars on town lots.
(Signed,) JOSEPH P. PULSIFER.

Johnson was put in possession, and continued in possession several years, when Pulsifer having died, the lots were sold by his administrator. Johnson brought suit to compel either a conveyance of the lots to him, or a money equivalent, but failed to obtain either measure of relief, the Texas Courts holding that the receipt was not a sufficient memorandum under the statute of frauds. "This memorandum," said the Supreme Court, "should be so reasonably definite and certain, within itself, or by other writing referred to, that the contract can be made out as to parties, consideration, and subject-matter, without a resort to parol evidence. It should be so certain that a specific performance of it can be enforced." (Johnson v. Granger, (1879,) 8 Me. Rep., 734.)

Qualified Refusal to Perform Contract.—Right of Action for Breach Before End of Contract Period of Performance.—The following statement of facts is taken from the syllabus of the case in *Dingley v. Oler*, 117 U. S., 490:

D., a Maine dealer in ice, finding himself late in the season of 1879, in possession of a large quantity which threatened to become a total loss, pressed O., another dealer, in Baltimore, Md., to buy part of it. O. declined to purchase, but offered to take a cargo and "return the same to you next year from our houses." D. accepted O.'s offer, and delivered the cargo of ice to him that season. Early in July of the season of 1880, D. verbally requested O. to deliver the ice. On the 7th of July O. wrote to D.: "It is not just or equitable for you to expect us to give you ice now worth \$5 per ton when we have letters of yours offering the ice that we got at 50 cents per ton. We must therefore decline to ship the ice for you this season, and claim as our right to pay you for the ice in cash at the price you offered it to other parties here, or give you ice when the market reaches that point." D. answered by letter, dated July 10th, that he had sold the ice in advance in expectation of its delivery to him, and it did not seem to him right that O. should ask for a postponement in the delivery. To this O. answered on the 15th of July by letter, in which, after restating facts which made the demand in his opinion inequitable, he said: "We cannot therefore comply with your request to deliver the ice claimed, and respectfully submit that you ought not to ask this of us, in view of the facts stated herein and in ours of the 7th. We will be glad to hear from you in reply, but will be more pleased to have a personal interview, and venture to suggest that you come here for the purpose." No reply was made to this suggestion, either personally or by letter, and this suit was commenced six days later.

On this state of facts the United States Circuit Court gave damages to D., but the United States Supreme Court reversed the judgment, agreeing indeed with the lower court "that according to the terms of the contract, the defendants (O. & Co.) had the option of delivering the ice contracted for at any time during the whole shipping season of 1880, giving to the

plaintiffs reasonable notice of the time when fixed, and an opportunity to prepare for receiving and taking it away from the defendants' houses. We differ, however," said the appellate tribunal, "from the opinion of the Circuit Court, that the defendants are to be considered, from the language of their letters above set out, as having renounced the contract by a refusal to perform, within the meaning of the rule which, it is assumed, in such a case, confers upon the plaintiff a right of action before the expiration of the contract period of performance. We do not so construe the correspondence between the parties. In the letter of July 7th the defendants say: 'We must therefore' (citing the language above given.) Although in this extract they decline to ship the ice that season, it is accompanied with an alternative intention, and that is, to ship it, as must be understood, during that season, if and when the market price should reach the point which, in their opinion, the plaintiffs ought to be willing to accept as its fair price between them. It was not intended, as we think, as a final and absolute declaration that the contract must be regarded as altogether off, so far as their performance was concerned, and it was not so treated by the plaintiffs. For in their answer of July 10th they report the demand for delivery immediately, speak of the letter of the 7th inst. as asking for 'a postponement of the delivery,' urge them to 'fill our order,' and close with 'hoping you (the defendants) will take a more favorable view upon reflection,' etc. Here, certainly, was a *locus penitentiæ* conceded to the defendants by the plaintiffs themselves. * * * * In Smoot's case, 15 Wall., 36, this court quoted with approval the qualifications stated by Benjamin on Sales, Section 568, that 'a mere assertion that the party will be unable, or will refuse to perform his contract, is not sufficient; it must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made; for, if he afterwards continue to urge or demand a compliance with the contract, it is plain that he does not understand it to be at an end.' We do not find any such refusal to have been given or acted upon in the present case."

Parties Who May Terminate an Agreement "For Good Cause," May do so at Will, in Good Faith.—An agreement by Butts and another, lumber dealers, commissioning one Cummer to make sales for them, provided that "for good cause this agreement shall be cancelled, upon sixty days notice by either party." The dealers, becoming dissatisfied, gave the requisite notice to terminate the contract. Cummer contended that there was no good cause for his dismissal, and sued for the commissions he might have earned if the arrangement had not been broken. A judgment for \$500 in his favor was reversed by the Supreme Court, and the following views expressed:

"The requirement of 'good cause' as something on which the right to revoke by one or the other should depend is, as here introduced, too vague to be fairly intelligible. It is manifestly applied to each party, but the phrase 'good cause' in such connection as to parties and subject-matter, has no such distinct sense as to furnish a common and intelligible criterion for the parties, or any determinate sense whatever. It is impossible to say that the will of the parties concurred, and that each meant exactly what the other did, or even to say what either meant. The room for difference is immense, and the case is one where the parties have failed to express themselves in terms capable of being reduced to lawful certainty by judicial effort. As employed, the expression has no frontier of meaning which can be defined. The passage in question being ineffective on account of its radical uncertainty, there was nothing to detract from the exercise of the right of revocation as it actually occurred, provided the plaintiffs in error acted in good faith." (Cummer v. Butts, 40 Mich.)

Notice of Intention not to Perform a Contract.—Such Notice no Breach.—Z. sued R. for the price of a quantity of coke, and R. pleaded as a counter claim damages for breach of contract by Z. The contract was dated November 11, to make further deliveries of coke, beginning December 1. Z.'s suit was brought November 29. Before that time Z. had notified R. that he would not deliver the coke in pursuance of the contract. On December 4 R. notified Z. that he was ready to

receive the coke, and that if deliveries were not made he would buy in the open market and hold Z. responsible for any difference in price. The Supreme Court held that under these circumstances, there was no breach of contract on the part of Z. at the time his suit was commenced. A mere notice of an intended breach is not of itself a breach of the contract. It may become so, if accepted and acted upon by the other party. The notice of an intention not to perform the contract, if not accepted as a present breach, remains a matter of intention, and may be withdrawn at any time before the performance is in part due. (*Zuck v. Rafferty*, Penn. Sup. Ct., November, 1881.)

Oral Evidence to Vary Written Contract.—The Supreme Court of the District of Columbia, in *Raub v. Barbour*, (*Washington Weekly Reporter*, vol. xvi., p. 35,) well illustrates a decision in the rule excluding oral evidence to vary a contract. The Court held, reviewing authorities, that a verbal contract collateral to the main written contract may be shown. In this case it appeared that a “covenant giving the lessee and his assigns an option of purchase of the land at a given price at any time during the term, was inserted in a lease in consideration of the contemporaneous verbal promise of the lessee that he would divide with the lessor whatever profit he (the lessee) should make in the event of his assigning the lease. The lessee thereafter assigned the lease for a large profit, and in an action by the lessor to recover one-half of the profit thereof, it was objected that evidence of the verbal contract was inadmissible as tending to vary the terms of the written instrument; but it was held, overruling the objection, that the verbal promise was collateral to the main written contract and did not interfere with its terms, and that an action would lie to enforce it. Evidence of such a promise would also be admissible as showing additional consideration for the execution of the written contract.” Compare *Van Brunt v. Day*, (8 Abb. N. C., 336; rev’g 17 Hun, 166), where the doctrine is established for our Courts.

In the case of *Lawson v. Floyd*, (U. S. Supreme Court,

January 9, 1888,) the Court affords an authority for a very proper relaxation of the rule excluding oral evidence to vary a contract in writing which is worth noting.

An action had been previously brought to enforce a vendor's lien on a contract for the exchange of two parcels of real property, and it was compromised by a contract by which a purchaser from the vendee assumed payment of what was due, and was given control and title to the parcel which plaintiff had received in exchange for what he conveyed. In both contracts the land was described without boundaries—in the one being stated to be of "about 1,000 acres," in the other as being "estimated to contain 1,000 acres."

The original purchaser of this parcel in the exchange now filed a bill in effect to rescind, or for a deduction and account, on the ground that there was a deficiency of over four hundred acres, and on the ground of false representations in inducing plaintiff to make the contract.

The Court, after reviewing conflicting evidence, said: "It is not easy to resist the conclusion that at this moment, when they were compromising a trouble, some lawsuit, the fag end of the controversy about all these lands, and the writing embracing that compromise was being drawn up for both of them to sign, and when the scribe put to them both the question as to the number of acres to be inserted in this description, their attention must have been called to that matter as one of importance, if either of them looked upon the number of acres as an essential part of the contract. And when Floyd, the purchaser, suggested the words 'a thousand,' and Mr. Lawson, the vendor, said 'No; I won't be bound by any particular number of acres; there are several tracts, and I don't know how they would run out,' and Floyd made no objection to that statement, but consented to the use of the words 'estimated to contain 1,000 acres,' the evidence seems to us satisfactory that, at least at that time, it was not considered that Lawson was bound for the thousand acres, or for any particular quantity of land."

As to the rule of credence the Court said: "As regards the question of law arising on the construction of the words

'about 1,000 acres of land' in the original contract, and especially the similar expression used in the compromise agreement, if there was nothing but the language to be looked to, it must be confessed that under the state of the authorities on that subject it would not be very easy to arrive at a conclusion entirely satisfactory. But in a case of this kind it is eminently proper to consider the circumstances surrounding the parties, and which would probably influence them in making the contract, at the time it was entered into. These, we think, throw much light on the question in this case, and leave but little doubt that it was not intended to bind Lawson to any particular number of acres in the transfer which he made to Floyd, but that the transaction was an exchange of different tracts of land between the parties to the contract, the parcels belonging to each of them being estimated in the lump or indicated by the boundaries and descriptions given in the instruments. The case is not that of a purchase, standing alone, of a tract of land by one person from another, which is to be paid for by a particular sum of money. It is a case of an exchange of several tracts of land between the parties. This was a governing element in the transaction. The consideration received by Lawson for the land which he was to convey to Floyd was not \$10,000 in money, but two distinct pieces of land described by the names of the places, to which Floyd agreed to give him a good title. It is obvious that the parties in making this exchange also had reference to the further circumstances that Lawson would have to pay out over eighteen thousand dollars to relieve the land he was to receive from Floyd from liens, a part of which were in judgments or decrees. The contract, then, is not to be construed by that strict rule in regard to the quantity of land which Lawson was to convey to Floyd that might govern its interpretation if it were an independent purchase to be paid for in money."

After commenting on the loose and general way in which the premises were described, the Court added: "It is not easy to see that, under the circumstances of this exchange of property, either party was binding himself by this loose language

to a definite number of acres in the land which he was conveying to the other, and it seems probable that the sum of twenty-six thousand dollars, said to be the value of the Floyd land, and ten thousand dollars, the value at which the tract of Lawson was put, was conventional, and adopted as a mode of adjusting the terms of the exchange, and was not intended or supposed by either party to be the actual value of the property so described. * * * Nor do we think it unimportant to consider that this compromise agreement of 1871, made fourteen years after Floyd was in the full possession and actual control of the land, and executed in an adjustment of a suit for the very purchase money, which Floyd now seeks to recover back, must have been made with a fair knowledge of the location, boundaries and description of the land in controversy, and that it was determined at that time to describe it with more particularity as to metes and bounds, and to reject a phrase by which Lawson might have been bound for a thousand acres, substituting in its place an expression which left it in the form of a conjectural estimate of the quantity therein contained. Under all these circumstances we are of opinion that Lawson is under no obligation to make good the difference between the amount of a thousand acres and the quantity found within the boundaries by actual survey. The decree of the Court, based upon the erroneous idea that he should be held so accountable, must therefore be reversed."

CORPORATIONS.

Regulation of Gas Companies' Charges.—Legislative Right Accompanying the Grant of a Monopoly Franchise.—The Columbia Gas Company was chartered in 1846 by the General Assembly of Ohio, the charter giving the company "the exclusive privilege of supplying the city of Columbus and its inhabitants with gas, for the purpose of affording light, for the term of twenty years." In 1867 the General Assembly passed an act for the regulation of gas companies, providing among other things that "no company shall have the right to charge rent for meters when 500 cubic feet per month have

been consumed." By an information in *quo warranto*, brought by the State, the company was charged, among other offenses, with usurping the privilege and franchise of charging each consumer of gas who consumed 500 feet or more per month, and compelling him to pay, in addition to the price of the gas, thirty cents, more or less, per month, as rent for the meter. The company justified the alleged usurpation, claiming that in the grant of its charter no right was reserved to control the price of gas, or the amount to be charged for the use of meters; but that such power, under the charter, rested exclusively in the discretion of the company. The Supreme Court, denying the validity of this plea, expressed the following views:

"Before this right of exemption from legislative control can be asserted, the right must appear to have been clearly granted by its charter. 'The rights of the public are never presumed to be surrendered to a corporation, unless the intention to surrender clearly appears in the law.' (Perrine v. Chesapeake Co., 9 How., 172.) The charter, in the present instance, grants to the defendant the exclusive right of supplying the city and its inhabitants with gas for the term of twenty years. It operates therefore not only to confer a public franchise on the defendant, but also to restrict the public from supplying its necessities from any other source. This creates a monopoly in the defendant, for the time the right is made exclusive. It is unreasonable therefore to infer that it was the intention of the legislature to exempt the defendant from all public control in respect to the terms upon which it should be required to discharge its duties to the public, unless such intention is found clearly expressed in the charter. The charter expresses no such intention. On the contrary, the plain implications are against the existence of any such exemption. The directors are authorized by the charter to make by-laws and rules for regulating all matters pertaining to the company, but such regulations are required to be consistent with the laws of the State. This provision is not limited to laws then in force, but extends also to such laws as may be passed in future. The charter does not prescribe the terms upon which gas is to be furnished to the public. The whole matter is left to be determined by such rules and

regulations not inconsistent with the laws of the State, as the directors may prescribe. The business in which the defendant is engaged largely concerns the public. As already remarked, the main purpose of its creation was to subserve the public interest. In *Mann v. Illinois*, 94 U. S., 113, it was laid down in respect to natural persons, that 'where the owner of property devotes it to a use in which the public have an interest, he in effect grants to the public an interest in such use, and must to the extent of that interest, submit to be controlled by the public for the common good as long as he maintains the use.' In that case the principle was applied to warehousemen, who were engaged in receiving and storing grain, and it was held that their rates of charges were subject to legislative regulation. The principle applies with greater force to corporations when they are invested with franchises to be exercised to subserve the public interest. Deriving their powers by grant directly from the public, they are clearly subject to public control in respect to the terms on which their franchises are to be exercised, unless they are protected by their charters from such interference. As we find nothing in the terms of the charter of the defendant which protects it from legislative control in respect to the matter in question, the right which it sets up to charge for the use of meters in contravention of the statute, is without warrant in law, and the plea setting up such right is adjudged insufficient." (*The State v. Columbia Gas, Light and Coke Co.*, 34 Ohio St.)

Conveyance to Trustees by Name and Description of Office.—

Corporation Itself Acquires Title.—A piece of real estate was deeded to certain persons named "and other trustees of the Woodbury Seminary," there being no express grant to the Seminary itself. It was held by the Supreme Court that the corporation was nevertheless thus invested with a valid title to the property. (*Hervey v. Buchanan*, 47 Iowa.)

Relations of a Patent-Owning Corporation to its Licensees.—

Liability to Suit in State Other than that of its Creation.—The Bell Telephone Case.—In the proceeding instituted by the United States to annul the Alexander Graham Bell patents for the electric speaking telephone, an interesting question

was involved, of more or less importance to all corporations doing business beyond the bounds of the states by which they are created. The question was whether the Bell Telephone Company was doing business in Ohio, where the suit was brought, in such a sense as to make it amenable to the process of courts having jurisdiction only in that State; or in legal phrase, whether the corporation was, as stated by the marshal's return, "found" in that jurisdiction. The writs were served in the northern district of Ohio, "by delivering a true and certified copy thereof to James P. McKinstry, vice-president of the Cleveland Telephone Company, the said Cleveland Telephone Company being an agent and partner of the said American Bell Telephone Company, within said northern district of Ohio." In the southern district the service was made in like manner, upon the president of the City and Suburban Telegraph Company, the marshal's return also stating that the American Bell Telephone Company was a corporation "doing business and found" within the district, and that the City and Suburban was its "partner and agent." The bill, in order to lay the foundation for such a return, set out the business relations between the Bell Company and the other companies named, alleging that these relations constituted the local companies "part owners, agents and representatives of the said American Bell Telephone Co." The latter entered a special appearance in order to move to set aside the return as untrue in fact; and also filed a plea in abatement denying the jurisdiction of the court, because "it was not, at the time of the filing of the bill in this case, nor of the attempted service of the subpoena herein, nor at any time since the filing of the bill, nor before, an inhabitant of, nor a resident of, nor present nor found, in the State of Ohio, * * nor engaged in carrying on the business of telephoning in the State of Ohio." The plea further described in detail the relations of the Bell Company with the licensee companies, showing that the former retained ownership of the telephones, while the local companies erected the lines, transacted the business, collected the rentals, and paid a stipulated sum per month for the use of each telephone. It was acknowledged that the Bell Company owned stock in four of the local companies, and held the majority of the stock in two of them.

It was, however, determined by the Court that relations of this character did not constitute the local companies agents or partners of the Bell Company, and it was said—"We think the decisions of the Supreme Court have settled and established the proposition that, in the absence of a voluntary appearance, these conditions must concur or co-exist in order to give the federal courts jurisdiction *in personam* over a corporation created without the territorial limits of the state in which the court is held, viz: (1) It must appear as a matter of fact that the corporation is carrying on its business in such foreign state or district; (2) that such business is transacted or managed by some agent or officer appointed by and representing the corporation in such state; and (3) the existence of some local law making such corporation, or foreign corporations generally, amenable to suit there as a condition, express or implied, of doing business in the state. When the local law, expressly or by comity, permits foreign corporations to do business in the state, when it also provides for suits against them in a reasonable and proper manner, and within the just limits of the state's power and authority; and when a foreign corporation thereafter enters the state, and transacts its corporate business by means of resident agents coming within the terms of the local statute—it may be *found*, and is liable to suit there in either the state or federal courts, by service of process on such agents."

These conditions being held to be absent in the present case, the marshal's returns of service were quashed, and the bill dismissed. (U. S. v. Am. Bell Co., 29 Fed. Rep., 17.)

Capital Paid in Property.—Exaggerated Valuation.—Liability of Holders of Stock Nominally Full Paid.—Holders in Good Faith Protected.—Elias H. Wright and William A. Wright procured a lease of iron mining land owned by one Coleman in Marquette county, Michigan, and expended some \$3,000 in exploring for ore. They discovered what they thought to be ore in paying quantities, supposed to be of a quality suitable for making Bessemer steel. The find was in the same range as the Republic, one of the best paying mines in the Upper Peninsula, and the ore partook largely of the same character as that obtained from the Republic mine. The Wrights proceeded to form a corporation named the Erie Iron Company

to work and develop the mine, placing the capital at \$500,000, in 20,000 shares. The stockholders were E. H. Wright, 12,400 shares, William A. Wright, 4,000 shares, and Peter Pascoe, B. H. Andrus, and F. H. Kearney, 200 each, the latter 600 shares being given or sold at a nominal price by the Wrights to the holders, for the purpose of interesting them in the corporation, and making the requisite number of stockholders under the statute. It was stated in the articles of association that the amount of cash actually paid in was \$3,000, and that the cash value of property conveyed to the company contemporaneously with its organization was \$422,000. In fact, the only property thus conveyed was the lease of the mine, and the \$3,000 cash consisted of the expenditure already made in exploration, etc. E. H. Wright was made the holder of 3,000 shares as a trustee for the corporation, these shares to be sold for working capital. Only 17,000 shares were issued, stated on the face of the certificates to be fully paid up and non-assessable. In September, 1883, the lease was forfeited for non-payment of royalty, and the company suspended business, owing besides the royalty debt some \$70,000, including a large amount to the Wrights themselves. One of the creditors got a judgment against the company, and execution having been returned *nulla bona*, he then filed a bill against the stockholders resident in Michigan, to make them personally liable for the debt, on the ground that the stock had not in fact been fully paid up. The bill charged that the lease transferred by the Wrights to the corporation at the sum of \$422,000, and counted as so much capital paid in, was worthless, and that this enormous valuation was placed upon it with the fraudulent intent to secure the stockholders from assessments to pay the just debts of the corporation, and so to cheat and defraud its creditors. It was also alleged that the stock, the par value of which was \$25, was placed on the market and sold at from \$5 to \$8 per share—none higher than \$8. It also alleged the insolvency of the Wrights. The Marquette Circuit Court decreed that the defendant share-holders, Martin Butzel, Magnus Butzel, Emil S. Heineman, Emil Heyn and Henry Heyn, being the only responsible ones within the jurisdiction of the court,

were each "chargeable with knowledge or notice of the facts by reason of which the stock in his hands remained unpaid and assessable for the payment of the just debts of the said corporation." It was referred to a commissioner to find whether or no there were other stockholders pecuniarily responsible within the jurisdiction of the court; if not, it was ordered that those named "must share *pro rata* according to the number of shares held by each, in the payment of the said debts." On appeal to the Michigan Supreme Court the decree was reversed. In delivering the opinion of the Court, Mr. Justice Morse said:

"I find no warrant in the testimony for the claim that the Wrights intended any fraud in the organization of this company. They honestly supposed that they had found value in this mine, and seemed to believe that it might become nearly, if not equally, as valuable as the Republic mine, then worth from \$1,000,000 to \$2,000,000. * * * * It is true they gave away some of their stock, and sold more or less at \$5, \$8, and \$12.50 per share, in order, as they claim, to get people interested in the company, and to procure funds to work the mine, but this action grew out of the necessity of the corporation. The circuit judge does not find any fraud in fact as charged in the bill of complaint, but he finds that the mine was not as valuable as the Wrights supposed, and that the lease held by them was not worth the \$422,000 but much less—not over \$80,000—and that therefore the statement in the articles of association was a fraud in law upon the creditors of the corporation.

"It must be considered as well settled that corporators cannot agree among themselves that property worth only \$80,000 shall be treated as worth \$422,000 and count at that sum as so much capital stock paid in, and then proceed to mark their shares as fully paid up and non-assessable upon such false basis—as such action would be clearly a fraud upon the creditors. But it is equally well settled that such corporators are not responsible for an honest error of judgment, or a mistake in placing a valuation upon property appropriated or used as capital by a manufacturing or mining company. * * * There was no deception practiced any

where, and any one dealing with the corporation had ample means of notice as to the character and value of its capital stock and property."

As to the defendant stockholders, Heineman, Butzel & Co., the court said they bought their shares in good faith, and "if there was no fraud upon the part of the Wrights, but simply a mistake or error of judgment in the overvaluation of the lease, the authorities are nearly unanimous that the holder of the shares, purporting upon their face to be fully paid up and non-assessable, cannot be called upon to pay the debts of the corporation." *Young v. Erie Iron Company*, (1887,) 8 Western Reporter, 153.)

Concealed Ownership of Bank Shares.—Individual Liability of the Real though not the Registered Owner.—Calvin Stevens, the owner of shares in a national bank, transferred them to one Elston, an irresponsible person, porter in the office of his New York broker. The bank was then, and for a year afterwards remained, in good credit. Stevens made other purchases of the stock, directing the transfers to Elston, and also sold stock, acting as Elston's agent under power of attorney to make the necessary transfers from Elston's to the purchaser's account. On the 22d of November, 1871, there stood to the credit of Elston on the books 161 shares, for which a formal certificate was issued in his name, and delivered to Stevens as his agent. On the 12th of December the bank failed, and the receiver undertook to hold Stevens liable as a share-holder under Section 5151 of the Revised Statutes. The United States District Court, southern district of New York, directed a verdict for the defendant, and the receiver appealed. The Circuit Court, in reversing the judgment and ordering a new trial, said: "The point to be decided now is, whether in an action at law by a receiver of the bank, the real owner of stock in a national bank standing by his procurement in the name of another, and never having been in his name on the books, can be charged as a share-holder with the statutory liability for debts. The Supreme Court at its last term held, in *Germania Bank v. Case*, 99 U. S., that if the registered owner transferred his stock in a

failing corporation to an irresponsible person for the mere purpose of escaping liability, or if his transfer was colorable only, the transaction was void as against creditors. At the same term in *Case v. Marchand*, an effort was made to charge Marchand with liability as the real owner of stock standing in the name of one Lubie, the allegation being that Marchand, having bought the stock from one Keenan, caused it to be transferred to Lubie for the purpose of concealing his ownership and escaping liability under the act of Congress. The Court decided the case on the ground that the evidence was not sufficient to show the actual ownership of Marchand; but there is nowhere an intimation that if the facts had been as alleged the action might not be sustained. The present case shows that Stevens bought the stock from registered owners and took assignments of their certificates with authority to complete the transfers on the books. As between Stevens and the vendors, this made Stevens the owner. At that time the vendors could have registered their transfers, and thus, while relieving themselves from liability, charged Stevens. (*Webster v. Upton*, 91 U. S., 71.) * * * As between Stevens and Elston, however, Stevens was the real owner, and Elston his authorized representative in the bank. So far as Elston was concerned the transfer to him was colorable only, and it is apparent that the only object Stevens had in causing it to be made was to conceal his ownership, and thus, if possible, escape all statutory liability. Such being the case, I am unable to see how he can occupy any different position from what he would if the stock had been taken directly from his own name on the books and put in that of Elston. He is still the real owner, with Elston as his agent, specially authorized to hold for him the legal title." (*Davis, Receiver, v. Stevens, Ex'r*, 28 Reporter, 710.)

Place of Meeting.—Validity of Acts Done Outside the Corporation's Domicile.—In the suit of a foreign bond-holder to set aside as invalid the Berdell mortgage on the Boston, Hartford & Erie Railroad Company, dated March 19, 1866, to secure the payment of \$20,000,000 in bonds issued by that company, it was alleged on behalf of the complainants that

the mortgage was based on authority given at a meeting of the share-holders held in the city of New York, when, as alleged, it was not a New York corporation, but a corporation of Connecticut, Massachusetts and Rhode Island, and that therefore the meeting was illegal and the mortgage void. The United States Circuit Court held that by virtue of the act of the New York Legislature, Chapter 385, Laws of 1864, to consolidate the road in question with certain other roads, the company became a New York corporation, and that accordingly the meeting was lawfully held, and its proceedings were binding on the company. The United States Supreme Court affirmed the decree, and said—"That a meeting in one of several states of the stockholders of a corporation chartered by all those states is valid in respect to the property of the corporation in all of them, without the necessity of a repetition of the meeting in any other of those states, is, we think, a sound proposition. Whether it be or be not true that proceedings of persons professing to act as corporators, when assembled without the bounds of the sovereignty granting the charter, are void. (*Miller v. Ewer*, 27 Me., 509.) There is no principle which requires that the corporators of this consolidated corporation should meet in more than one of the states in which it has a domicile, in order to the validity of a corporate act." (*Graham et al. v. Boston, Hartford & Erie Railroad Company et al.*, 118 U. S.)

In the Maine case cited it was held that a corporation created by the State could "hold no meeting for the election of its officers or the regulation of its affairs, without the limits of the State." A distinction was drawn between such acts as may be performed by a board of directors, the court saying that "the directors of a corporation are not a corporate body, are, when acting as a board, but a board of officers or agents, and they may exercise their powers as agents beyond the bounds where the corporation exists."

Contract by Official without Naming Corporation.—Implication from Contracting Party's Knowledge.—"I promise to pay to the order of T. S. Lowe, Pres't, * * * value received. I. C. Thompson." This note was indorsed "T. S. Lowe, Pres't," and transferred in payment of a debt owed by the

gas company of which Lowe was president. The note being unpaid, Lowe was sued individually on his indorsement. The defense was that the note was given to the company, was indorsed by him as its representative, and that the contract of indorsement was therefore the company's and not his own individually. The Pennsylvania Supreme Court took this view, but were led to do so by the special feature of the case referred to in the following sentence of its opinion: "The plaintiffs were dealing with the gas company when they took the note from T. S. Lowe. They received it in payment of a debt due from the gas company, and therefore must have known that the indorsement of the note by its president was the indorsement by the company." (Seyfert v. Lowe, 1879.)

Stock and Stockholders.—Title to Dividends.—Between Buyer and Seller.—Transaction Incomplete.—It is sometimes the case that an incomplete sale of stock is made, without actual transfer of the scrip, or payment, and before its completion by these acts, a dividend is declared. Is the buyer or seller, in such a case, entitled to the dividend? The courts have not had an opportunity to answer this question exhaustively, but it appears that where the sale itself is not subject to a contingency, or dependent upon a future state of mind on the part of seller or buyer, the dividend belongs to the latter. Example: Homersham sold to Black, early in August, his shares in a gas company, with payment of twenty per cent down, and remainder on August 29th. On August 28th a dividend was declared, and Black having completed his payment according to contract, was adjudged to be entitled to the dividend. (L. R. 4 Exch. Div., 24.) (1878.)

On Shares Sold, Seller's Option.—The question whether buyer or seller was entitled to dividends declared subsequently to the date of the following contract, was decided by the New York Court of Appeals in the case of Currie v. White, 45 N. Y., 822:

1,000 Shares.

NEW YORK, Feb. 18, 1867.

I have sold to Currie, Martin & Co. one thousand shares of the capital stock of the Hudson River Railroad Company, at 128 per cent, payable and deliverable, seller's option, in this year, with interest at the rate of six per cent per annum; either party having the right to call, from time to time, for deposits to meet the fluctuations of the market.

(10-cent stamp.)

C. G. WHITE.

A corresponding bought note was signed by Currie, Martin & Co. On April 15th and October 15th, of the same year, dividends were declared, payable to holders of stock on February 18th and October 15th. White did not exercise his option to deliver the stock until December 18th. Currie, Martin & Co. accepted the tender, at the same time demanding the dividends. White refused to comply with this demand, but the Court of Appeals said he must. "By a contract such as this," said the Court, "the seller of shares deliverable at a future time assumes to have them, and to make a present sale of them, and to hold them for the benefit of the purchaser until delivery. The language of the contract imports a sale *in præsenti*, and charges the purchaser with interest on the purchase money, from the time of the sale to the time of delivery. * * * On this theory the purchaser pays interest on the purchase money. He is, therefore, entitled to dividends accruing between the sale and the delivery."

The Supreme Court came to a different conclusion, on a contract by which John M., John and Charles Lord "agreed to sell" to one Bright 520 shares of the Indianapolis Rolling Mill Company, at his option, to be taken at any time previous to June 18th, 1883, afterwards extended to July 18th. A dividend was declared July 3d, payable August 1st. On the 16th of July Bright exercised his option and took and paid for the stock, claiming also the dividend. It was decided that he was not entitled to it, because, the Court said, "*Bright did not* become the owner of the stock until the 16th day of July, 1873. Up to that time it was optional with him to purchase it or refuse it. The Lords would have had no remedy if Bright had refused the stock, and Bright would have suffered no loss, except the consideration he had paid for the option, and incurred no liability whatever." The language of the Court is also expressive as to the right of dividends declared before but payable after a change of ownership. "The dividend had been declared on the 3d day of July, 1873, and the amount fixed, by which it became the property of the Lords at that time, although not payable until the 1st day of August ensuing." (Bright v. Lord, 51 Indiana, 272.)

These cases are not in real though apparent conflict. The first was an absolute sale with an option merely as to the time of delivery and payment; the second appears to have been merely an *option to buy*, where there was no sale until the option was exercised.

Proceedings of Corporate Directors and Managers.—Have Stockholders or Members a Right to Know what is Done?—The Right to Inspect Books and Minutes.—In an English case the right of stockholders in a joint stock company to inform themselves with regard to the proceedings of the directors was passed upon by the Court of Queen's Bench. (Queen v. Mariquita Mining Company, 1 Ell. and Ell., 289.) The deed of settlement required the secretary to make the proper entry in a book of minutes of the proceedings of general meetings, and keep a book of minutes of the proceedings of the directors, and provided that the by-laws, the register of shareholders, and the books of balance and account should be open to the inspection of share-holders. Richardson, a share-holder, asked a mandamus to compel the secretary to grant him an inspection of the "book of minutes of the proceedings of the said company." The Court, in giving judgment against the demand, said: "The question is, whether Mr. Richardson, as a share-holder of the company, is entitled, any day, on requiring it at the office of the company, to an inspection of the book containing the minutes of the proceedings of the directors. He is clearly entitled to, and has been offered, such inspection of the book containing the minutes of the proceedings of the company, *i. e.*, of the meetings of the share-holders; and to this we think his right is restricted. * * * * The proposed daily and hourly inspection and publication of all their proceedings would be tantamount to admitting the presence of strangers at all their meetings, and would probably ere long be found very prejudicial to the share-holders."

The Supreme Court expresses the opinion that "if we are not greatly in error, a private stockholder of an incorporated company has no right to have access to the minutes of the proceedings of directors, unless that right is expressly given

by charter, and consequently and of necessity he must remain ignorant of their action until they choose to make that action known." Again: "There is a very marked and obvious difference between the action of a general meeting of the stockholders and that of a board of directors. All the proceedings of the former are presumed to be known to each individual stockholder, it being not only his right but his duty to be present for the purpose of participating in such proceedings. But not so with reference to the proceedings had at a meeting of the board of directors. These proceedings are usually private." (*Ala. & Fla. R. R. Co. v. Rowley*, 9 Fla., 508.)

Statutes do not always cover the whole question at issue. They usually, as in this State, assure share-holders the right to inspect the "stock book" and "transfer-book," and where the information properly to be found in such books cannot be had without the inspection of other books, the latter must be exhibited. In a case of this kind, where a mandamus was sought to compel the Pacific Mail Steamship Company to exhibit their stock ledger to a share-holder, Judge Gilbert, in the Supreme Court, Kings county, basing his opinion on the Revised Statutes, said: "I think it clear that a right of inspection generally is not given, but that it is restricted to the register of transfers and the list of stockholders; or if such books are not formally kept, to such books as the company do keep, for the purpose of showing the original ownership of the stock and the changes which shall have occurred from time to time in such ownership." (*People v. Pacific Mail Steamship Company*, 50 Barb., 280.)

In some of the states, however, as in Ohio, California, etc., the right of inspection extends to all corporate records. In Michigan this right is given to bank share-holders; but the Supreme Court denied a plank road company stockholder's demand for an inspection of all the corporate records, including the proceedings of the directors. He alleged his reason to be his desire "to ascertain the condition of said company, as well as to ascertain and determine the rights, duties, privileges and liabilities, and for the protection of this deponent as such stockholder." In refusing the writ of mandamus asked, the Court said: "I have examined all the cases to

which we have been referred, and we find none where the writ was granted to enable a corporator to gratify idle curiosity. The principle seems to be, and very properly too, that the party asking the writ must have some interest at stake which renders the inspection necessary." (People v. Walker, 9 Mich., 328.) In the opinion of a recent text-book writer, "It would take a very strong case to induce a court to issue a mandamus commanding the corporate officers to allow a stockholder to inspect the minutes of the meetings of the directors." (Cook on Stock and Stockholder, Section 517.)

Right to Dividends.—Existence of Surplus Earnings not Alone Sufficient.—Declaration by Directors a Prerequisite.—On the reorganization of the New York, Lake Erie & Western Railway in 1878, a plan and agreement of re-adjustment previously adopted, was made one of the articles of association, and stipulated as follows:

"(13.) Preferred stock, to an amount equal to the preferred stock of the Erie Railway now outstanding, to wit, eighty-five thousand three hundred and sixty-nine shares of the nominal amount of \$100 each, entitling the holders to non-cumulative dividends, at the rate of six per cent per annum, in preference to the payment of any dividend on the common stock, but dependent on the profits of each particular year, as declared by the board of directors."

By the report of the board of directors for the fiscal year ended September, 1880, it appeared that after adding together the net earnings of the road, and the "earnings from other sources," and deducting the operating expenses, interest on funded debt, rentals of leased lines, and other charges, there was, in the language of the report, "a net profit from the operations of the year of \$1,170,620.71. This amount," continued the report, "together with \$737,119.34 received during the year from the assessments paid on the stock of the Erie Railway Company, has been applied to the building of double track, erection of buildings, providing additional equipment, acquiring and constructing docks at Buffalo and Jersey City, and to the addition of other improvements to the road and property."

Two of the preferred stockholders, believing that they had a right to dividends in preference to these expenditures for betterments, filed a bill asking that the company be required to declare such dividend, and the United States Circuit Court for the southern district of New York, made a clause in accordance with the prayer of the bill. The United States Supreme Court reversed the decree and ordered the bill to be dismissed. The court reviewed the circumstances which seemed to show that "the use of the surplus fund in the way in which it was applied was imperatively demanded by the interests as well of creditors, share-holders and bond-holders as of the public," and cited the testimony of President Jewett—"In my judgment, if these improvements had not been made, and most judiciously made, the company could not not have paid its fixed charges. It would have again gone into bankruptcy, and the entire interest of the stockholders been destroyed." The question under what conditions the right of the preferred stockholders to a dividend, as stipulated by the agreement, and articles of association, was discussed in the following terms:

"That instrument did, indeed, provide for preferred stockholders being paid a dividend of six per cent before any dividend was paid to common share-holders. But it was not intended to confer upon the former an absolute right to a dividend in any particular year, dependent alone on the fact, or the official ascertainment of the fact, that there were profits in that year, after paying operating expenses and fixed charges. The words of the thirteenth article, 'as declared by the board of directors,' do not qualify the words 'dependent on the profits of each particular year.' They should rather be read in connection with the preceding words, 'non-cumulative dividends, at the rate of six per centum per annum, in preference to the payment of any dividend on the common stock.' * * What was stipulated to them as holders of preferred stock in the new company was not a *debt* payable in every event out of the general funds of the corporation, but a *dividend*, 'as declared by the board of directors,' and payable out of such portion of the profits as should be set apart for distribution among share-holders; non-cumulative,

because 'dependent on the profits of each particular year,' and not to be fastened on the profits of succeeding years. That the parties contemplated the declaration of a dividend, and not a mere statement of net profits during a designated period, is made evident by the requirement that 'dividends' to preferred stockholders should be paid 'in preference to the payment of any dividend on the common stock.' This language is not consistent with the theory that the holders of preferred stock were entitled to six per cent thereon simply because there were profits, and irrespective of any declaration of a dividend. A declaration of profits, as in itself, and without further action by the directors, entitling share-holders to dividends, is unknown in the law, or in the practice of corporations. Dividends are 'declared' by some former act of the corporation; the question whether there are or are not profits being settled entirely by the accounts of the company as kept by subordinate officers, not by the mere statement of directors as to what appears upon its books." (N. Y., L. E. & W. R. R. Co. v. Nichols, 7 Sup. Ct. Rep., 209; Reversing 15 Fed. Rep., 575.)

Payment of Capital in Property.—Over-valuation.—If Made in Good Faith, Stockholders not Liable to Creditors.—The case of corporations formed with a certain nominal capital, paid in largely by putting in property at a valuation sometimes extravagant, occurs so often that another section may be not unprofitably given to this subject. In Coit v. North Carolina Gold Amalgamating Company, 7 Sup. Ct. Rep., 231, the United States Supreme Court (1887) again passed on a case of the kind. The company named was formed under the laws of North Carolina with a minimum capital of \$100,000, and power to increase it, by a majority vote of the stockholders, to two and a half millions. The charter provided that the subscription to the capital stock might be paid "in such installments, in such manner, and in such property, real and personal," as a majority of the corporators might determine, and that the stockholders should not be liable for any loss or damages, or be responsible, beyond the assets of the company. Previously to incorporation the corporators had been engaged in mining operations, and after obtaining a

charter the capital stock was paid by the property already in the business, valued at \$100,000. The plaintiff was a judgment creditor, and being unable to collect his debt of the company, by reason of its insolvency, he sought to make the stockholders personally liable, as if the whole amount of capital had not been paid in, alleging that the valuation put upon the property, reckoned as payment of the capital, was illegally and fraudulently made at an amount far above its actual value. It was alleged that it consisted only of a machine for crushing ores, the right to use a patent called the Crosby process, and the charter of the proposed organization; that the articles had no market or actual value; therefore that the capital stock issued thereon was not fully paid or paid to any substantial extent; and that the holders thereof were still liable to the corporation and its creditors for the unpaid subscription. In the United States Circuit Court for the eastern district of Pennsylvania, where the bill was filed, it was dismissed, and on appeal the decree was confirmed.

A point in the case, involving an increase of the capital stock to \$1,000,000, upon the purchase of certain lands, the subsequent cancellation of the increased stock, and a reduction of the capital to its original amount, is hardly necessary to be noticed here. Upon the main issue the appellate court expressed its views as follows:

“If it were proved that actual fraud was committed in the payment of the stock, and the complainant had given credit to the company from a belief that its stock was fully paid, there would undoubtedly be substantial ground for the relief asked. But where the charter authorizes capital stock to be paid in property, and the share-holders honestly and in good faith put in property instead of money in payment of their subscriptions, third parties have no ground of complaint. The case is very different from that in which subscriptions to stock are payable in cash, and where only a part of the installments has been paid. In that case there is still a debt due to the corporation, which if it becomes insolvent, may be sequestered in equity by the creditors, as a trust fund, liable to the payment of their debts. But where full paid stock is

issued for property received, there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account. A gross and obvious overvaluation of property would be strong evidence of fraud. But the allegation of intentional and fraudulent under-valuation of the property is not sustained by the evidence. The patent and the machinery had been used by the incorporators in their business, which was continued under the charter. They were immediately serviceable, and therefore had to the company a present value. The incorporators may have placed too high an estimate upon the property, but the court below finds that its valuation was honestly and fairly made; and there is only one item, the value of the chartered privileges, which is at all liable to any legal objection. But if that were deducted, the remaining amount would be so near to the aggregate capital that no implication could be raised against the entire good faith of the parties in the transaction."

Liability of Directors.—The well established doctrine of equity that directors of a corporation cannot escape the liabilities and restrictions which the law places upon persons acting in a fiduciary capacity, has been pared down and trimmed away by many of our courts. Sometimes on the ground of looking at the relative amount of plaintiff's holding of stock, or the time when he acquired it, or the motives imputed to his suit, or by invoking the doctrine of acquiescence, or the notion that if a majority of stockholders could consent, a minority cannot object.

The most recent re-assertion of the wholesome principles established in the English Chancery, and fully applied by Chancellor Walworth in this State, is in a decision rendered in the Franklin County (Ohio) Common Pleas. *Columbus & Hocking Valley Railroad Company v. Stevenson, Burke & Co.*, (reported in 19 Weekly Law Bulletin, 27.)

The familiar rules as to trusts were there applied to the fund raised by the sale of corporation mortgage bonds.

The Court held that such a fund, raised for purposes stated in the mortgage pursuant to statute, is a trust fund, to be

used in good faith by the corporation for the purposes stated in the mortgage.

Where such trust fund, amounting to \$8,000,000, has been used by the directors of the railroad corporation to purchase from a majority of themselves and from other persons the entire capital stock of a mining corporation, of the value of only \$800,000, and such use of the fund was beyond the powers of the railroad corporation, and contrary to the terms of the mortgage: held, that such use of the fund is *prima facie* a violation of the rights of the owners and holders of the bonds and an injury to them; which equity, upon their application, could have prevented by injunction.

The directors of a corporation are its agents, and their relation to it is generally one of confidence and trust. The law does not permit them to purchase, for it, their own property, or property in which they are largely interested. Therefore when the directors of a railroad company have purchased, from themselves and others, the entire capital stock of a mining corporation, and paid for the same with the corporation funds, the contract is void, and an action lies against them in favor of the company, to account for the funds so received by them. And the rule is the same, though a minority of the directors had no interest as sellers in the property purchased.

The company is not estopped from maintaining the action by the fact that at the time of the purchase of the stock and use of the funds, the directors owned all its capital stock, and as stockholders unanimously ratified what they, as directors, had done.

The directors having, from the proceeds of the bonds, discharged a private indebtedness due from them to a third party who held their stock in the plaintiff company as collateral thereto, the company may follow the funds so used into the stock and claim an equity in it.

Such collateral stock, after redemption, was held by defendants as trustees for the plaintiff, and the latter, though not empowered to traffic in its own stock may, as *cestui que trust*, have an equity therein.

CROPS.

Lien on for Services.—1. A laborer, who has been employed by a farmer to harvest a crop is not entitled to a lien upon it, for the value of his work and services, in the absence of a special contract creating it, to be followed by an actual and physical change of possession in the nature of a pledge. (*McDearmid v. Foster*, (Oregon,) 12 Pacific Reporter, 813.)

2. An agreement by which plaintiff was to work upon defendant's farm, the latter to furnish the mules and implements necessary therefor, the profits, after paying expenses, to be divided equally, does not create between the parties the relation of debtor and creditor, such that the plaintiff is entitled, under Code of North Carolina, §§ 1781, 1782, to a lien upon the crops for the work so performed, but abandoned before completion, for the failure of the defendant to perform his part of the agreement. (*Grissom v. Pickett*, (N. C.,) 3 South-Eastern Reporter, 921.)

3. A provision in a chattel mortgage declared a lien, on certain naval stores not then in existence, which the mortgagor consented to ship to the mortgagees during the year. The mortgage failing for insufficiency in the granting clause, held, that such provision could not, under the South Carolina statutes, be considered to create an agricultural lien. Such liens were created by statute to favor and encourage the cultivation of the soil, and the courts cannot extend the statutory provision so as to cover the case stated. (*Whilden v. Pearce*, (S. C.,) 2 South-Eastern Reporter, 709.)

Advances On.—1. A mortgagee of a cotton crop, who in order to gather and secure the crop makes further advances to the mortgagor, does not thereby obtain a lien on the proceeds of the sale of the crop that takes precedences of a lien created by a second mortgage or deed of trust executed to a trustee to secure an indebtedness due from the mortgagor to his wife for moneys advanced to him. (*Weathersbee v. Farar*, (N. C.,) 1 South-Eastern Reporter, 616.)

2. An agreement that in consideration of advances to make a crop, the cropper sells, transfers, and agrees to deliver

enough of said crop to cover the advances, only secures advances made after its execution. (*Lowdermill v. Boslick*, (N. C.,) 3 South-Eastern Reporter, 844.)

Landlord and Tenant.—Under Mansf. Dig. Ark., § 4452, providing that, where land is rented for a share in the crop, no mortgage or conveyance of any part of the crop made by the person cultivating the land shall be valid, unless made with the consent of the employer or owner of the land or crop, which consent must be endorsed on such mortgage or conveyance, when their respective rights in the crops have been ascertained and adjusted, and the laborer's or tenant's part specifically set aside to him, he may mortgage it or dispose of it as he will, independently of the landlord's consent. And a mortgage made in such case of the laborer's or tenant's share, without the landlord's consent, will prevail as against a subsequent purchaser from the tenant or laborer. (*Parkes v. Webb*, (Ark.,) 3 South-Western Reporter, 521.)

Priority of Liens On.—A tenant agreed with his landlord to pay the taxes due on the leased premises for a given year. The tenant subsequently executed a mortgage on his crop to secure a merchant for supplies to be furnished during the year. The crop proved insufficient to pay both the landlord and merchant, and the tenant delivered three bales of cotton to the former and turned over the balance of the crop to the merchant as mortgagee. Held, that as the agreement of the tenant was to pay the taxes due on the specified tract of land, for a given year, the landlord had a statutory claim to the three bales of cotton which was paramount to the claim of the mortgagee. (*Roberts v. Lewis*, (Miss.,) 2 Southern Reporter, 72.)

Executors and Administrators.—Under Code of Alabama, 1876, § 2439, which enacts that "The executor or administrator may complete and gather a crop commenced by the decedent," and § 2440, which makes a crop, completed by the executor, assets in his hands, it is optional with the executor to complete and gather a growing crop. (*Blair v. Murphree*, (Ala.,) 2 Southern Reporter, 18.)

Dower.—If the executor does not enter and make the crop, and thereby convert it into assets of the estate, it will belong to the widow, under Code of Alabama, 1876, § 2238, which provides that the widow may retain possession of the dwelling-house, and the plantation connected therewith, until her dower is assigned, free from payment of rent.

CUSTODY OF PROPERTY.

Gratuitous Care of Valuables.—Loss Without Negligence.—Bailee not Liable.—S. deposited bonds valued at \$4,500 with his brother-in-law, N., for safe keeping, and four of them were afterwards stolen. In an action to recover their value, S. alleged both negligence and conversion, but the Supreme Court failed to sustain either branch of the plaintiff's case. The theft was committed by a woman who entered the house by the street door early in the morning, went up stairs into the room where the bonds were kept, locked in a bureau drawer, broke open the drawer, and then broke the lock of the box containing the bonds, taking also some papers and jewelry belonging to N., and escaping from the house without meeting any one. With respect to the charge of negligence the Court said:

“The proofs show that the bonds were left with the defendant for safe keeping, without any reward or profit, and that he agreed to take care of them solely for the accommodation of the plaintiff; that he put them in a box in which he kept his own valuable papers, and put the box in the bureau drawer in his bedroom, and that both box and drawer were locked; that this was done with the knowledge and consent of the plaintiff, and that they remained there with his consent. Under these circumstances the plaintiff cannot reasonably say there was any negligence in regard to the place in which the bonds were kept. If this be so, there is no evidence to show that they were subsequently lost by any wrongful act or fault of the defendant. He was not required, of course, to keep the doors of the chamber room in the third story locked in the day-time, much less could he be required to keep watch against such a bold and daring theft as this.

“There is a well recognized distinction in regard to the case and diligence required of a bailee for hire, and one who undertakes to keep property without reward, and solely for the accommodation of another.”

A previous decision is cited in which it is said “this court has laid down in explicit terms what seems to us the most satisfactory rule or test, by which the liability of unpaid bailees is to be determined, namely, that he is bound to observe such care in the custody of property committed to his keeping, as persons of ordinary prudence, in his situation and business, usually bestow in the custody and keeping of like property belonging to themselves.” (*Schermer v. Neurath*, 54 Maryland Reporter.)

Bailment.—Special Bank Deposits, etc.

SECTION I.

Bailment defined.—“A delivery of goods in trust for some special object or purpose.”—*Blackstone*.

SECTION II.

Degrees of care required in the custody of property on bailment:

1. Slight care, which is that degree of care which every man of common sense, though very absent and inattentive, applies to his own affairs.

2. Ordinary care, which is that degree of care which every person of common and ordinary prudence takes of his own concerns.

3. Great care, which is the degree of care that a man remarkably exact and thoughtful gives to the securing of his own property. (1 Parsons on Contracts, 87.)

SECTION III.

There are accordingly, three degrees of negligence—

1. The absence of slight care constitutes gross negligence;

2. The absence of ordinary care constitutes ordinary negligence;

3. The absence of great care constitutes slight negligence. (1 Parsons on Contracts, 87.)

SECTION IV.

Bailees themselves are distributed by Parsons into three general classes corresponding with these degrees of care and negligence:

1. Where the bailment is for the benefit of the bailor alone. In this class, but slight care is required of the bailee, and he is responsible only for gross negligence.

2. Where the bailment is for the benefit of the bailee alone. In this class, the greatest care is required of the bailee, and he is responsible for slight negligence.

3. Where the bailment is for the benefit both of bailor and bailee.

In this class, ordinary care is required of the bailee, and he is responsible for ordinary negligence.

CLASS I.

DEPOSIT FOR THE BENEFIT OF DEPOSITOR ALONE.—LIABILITY OF BANK FOR SPECIAL DEPOSIT.—POWER OF NATIONAL BANKS TO RECEIVE SUCH DEPOSITS.—LIABILITY OF BANK FOR SPECIAL DEPOSITS.

Illustration.—One A. deposited in the Essex Bank, for safe keeping, a large quantity of gold. The treasure was placed in a cask, and kept within the bank vault in the same manner, and with the same care, as other special deposits, and as the specie of the bank itself. It was, however, stolen by the cashier and chief clerk, who thereupon absconded, having also defrauded the bank of the greater part of its capital. The cashier and clerk supported fair reputations up to the time of the discovery of their crime, and the directors were not chargeable with knowledge of the robbery.

Held, by the Supreme Court, that the bank was not liable to A. for the loss. (*Foster v. The Essex Bank*, 17 Massachusetts, 479.)

SECTION V.

The question, whether the officers of a bank can make the bank the gratuitous bailee of a special deposit and render it liable in any event whatever, was presented in the above case, and the point was, as observed by Judge Rappallo of the New York Court of Appeals, “argued by the most eminent counsel of the period, and decided by a court of distinguished reputation,” in the affirmative. The power of the national banks to incur the liability of gratuitous special depositaries was, however, subsequently called in question, and denied in two Vermont cases, but it was affirmed by the Supreme Courts

of Massachusetts, Pennsylvania, Iowa, Georgia, the New York Court of Appeals, (the Supreme Court of the United States,) and is now the settled doctrine.

SECTION VI.

The question of negligence is one of fact for the jury :

Illustration.—Pattison deposited a package of bonds with Ballard, teller of the Syracuse National Bank, but who sometimes acted as cashier, and the package remained in the bank safe some two years, the owner taking it out occasionally to detach the coupons. The safe was so situated as to be accessible to a person entering the bank from the street, and the employees were so placed that at times the safe was not in their view. The bonds were stolen in the day-time, while the bank was open, and it was in evidence that the safe was sometimes left open. The court left it for the jury to say whether there was or was not gross negligence in the care of the bonds, and the jury found that there was.

Held, by the Court of Appeals, that the question was properly submitted to the jury, and the court said—"The jury could from the evidence have found that the theft was committed by some person entering from the street and finding the safe open, who abstracted the plaintiff's package without being observed by any one in the room, and that leaving the property thus exposed was gross negligence. * * * The fact that property of the bank was stolen at the same time from the same place is not conclusive against the allegation of gross negligence." (Pattison v. Syracuse National Bank, 22 A. S. J., 506.) (1880.)

SECTION VII.

For it is not enough that a careless person bestows the same degree of care upon the property of another in his custody as he does upon his own :

Illustration.—B., a broker, undertook, without reward, to carry a bag of gold belonging to A., from New York to Boston. He went on board the Providence boat, having the gold in two bags in his valise, with other gold of his own, and put it in a berth in the forward cabin. He made inquiries whether the valise would be safe, and was told that if it contained valuables it had better be put into the custody of the

captain's clerk, under lock and key. He nevertheless left the property where he had first placed it, and the boat lying at New York all night he went to the theatre, and returning slept in the middle cabin. In the morning he discovered that one bag of the gold was gone, and went on deck to send information of the loss leaving his valise containing the other bag of gold on a table in the cabin. On his return this was also missing.

Held, by Story, J.: "The present is a case of a mandatary of money. Such property is by all persons, negligent as well as prudent, guarded with much greater care than common property. The defendant is a broker, accustomed to the use and transportation of money, and it must be presumed that he is a person of ordinary diligence. He kept his own money in the same valise, and took no better care of it than of the plaintiff's. Still, if the jury are of opinion that he omitted to take that reasonable care of the gold which bailees without reward in his situation usually take, or which he himself usually took of such property, under such circumstances, he has been guilty of gross negligence." (*Tracy v. Wood*, 3 Mason, 132.)

DEBTOR AND CREDITOR.

Payment by Paper Security.—Substitution of One Acceptance for Another.—The Riverside Iron Works of Wheeling, W. Va., sold a quantity of iron rails, etc., to the Great Western Iron Company of Crystal Falls, Mich., and received therefor the individual acceptance due in four months of S. C. Hall, president of the company. The following acknowledgment was made: "We acknowledge receipt of your valued favor of the 26th inst., covering acceptance for \$853.87 in settlement of account as stated." The acceptance was not paid at maturity, and subsequently an agent of the Riverside Works went to Crystal Falls commissioned to make settlement of the suspended account. He met Hall on the train, and was assured by him that his company only needed a little time, that "in sixty days he thought there wouldn't be any question at all but what they would be able to pay all of their indebtedness."

Mr. Hall said "he would make settlement with the paper of the Great Western Iron Company on sixty days time, if that would be satisfactory—if the time would be satisfactory—and that there would not be any question in his mind but what it would be paid at maturity." The agent also made some inquiries, the results of which he regarded as confirmatory of Mr. Hall's statements. Thereupon the Great Western Iron Company's paper was given in exchange for Mr. Hall's own dishonored acceptance, and the latter surrendered. On the maturity of the substituted security that too was unpaid, and the creditors sued Hall on the original debt, for so many car-loads of iron. The jury gave them a verdict for the amount of their claim. Hall appealed, and the Michigan Supreme Court reversed the judgment, ordering a new trial. "We think," said the Court, "that all the testimony shows that the first draft accepted by the defendant (Hall) was received by the plaintiff in payment for the property." In support of this view the following summary of evidence was given:

"It is quite clear that when the iron was purchased it was for the use of the Great Western Iron Company; also that the defendant gave his own individual acceptance therefor, due in four months, and received credit for the same on the books of the Great Western Company. When the draft became due the defendant gave the acceptance of the company, for what was before his individual paper, due in sixty days, and was then charged with the amount of the company's acceptance upon the company's books. When the defendant gave the plaintiff's agent the Great Western Company's acceptance for his own liability, it does not appear that he was asked to accompany the same with his individual liability in any way, or that he promised it to the plaintiff in any form. If the plaintiff expected that liability to continue for sixty days longer, the ordinary way of securing it would clearly have required the draft to have been drawn in such a manner that he would have indorsed it. This was not done, and it has a bearing upon the question in what manner and for what purpose the acceptance of the company was received, whether as payment or as security. This circumstance, taken

in connection with the fact that the defendant's individual acceptance was regarded by the plaintiff as a settlement of the account for the iron purchased, and which was delivered up unconditionally to the defendant, is, I think, clearly sufficient, *prima facie*, to show that the acceptance of the company was received by the plaintiff as payment. * * * The surrender of the evidence of the debt or liability strongly indicates payment, as whatever is received therefor is to be regarded as payment. I have been unable to find any evidence in the case tending to contradict the *prima facie* case that the company's acceptance was received in payment of the first draft and defendant's acceptance thereon." (River-side Iron Works v. Hall, 7 Western Reporter, 350.)

Whether Note is Payment.—Different Law in Different States.—When One or the Other Controls.—Stevens, a merchant in New Hampshire, was indebted to Gilman, of Massachusetts, on account of goods sold to him in Boston by the latter. Gilman's traveler called on Stevens for payment, and was offered notes, which he forwarded to his principle, who retained them and had them discounted. Before their maturity, however, he began suit on the account, and a few days afterwards paid the bank the amount of the notes and took them up. The question was, whether Gilman could then sue on the account, without reference to the time when the notes became due.

In New Hampshire, where the debtor resided and the notes were executed and payable, the acceptance of a note does not operate as a payment of the indebtedness for which it is given, unless there is a special agreement to that effect. In Massachusetts the reverse is the case, and in the absence of any agreement on the subject, the note constituted payment. Under the Massachusetts rule Gilman could not have sued on the account, but must have waited and brought his action on the notes. But the New Hampshire Supreme Court held that the transaction was governed by New Hampshire law, that Stevens continued to be indebted on the account, and consequently that Gilman could then sue and recover. (Gilman v. Stevens, July 31, 1885.)

Debtor's Conveyance to Wife and Children.—When Less than Statutory Exemption, Cannot be Attached by Creditors.—William M. Carr, while indebted to Letitia Faurote, bought a piece of land, paying for it with his own money, and had it deeded to his wife and minor children. At the time of the conveyance and thenceforward, Carr was the owner of a less amount of property than would have been allowed him by the exemption laws of the state. Letitia brought suit to have the conveyance set aside, in order to subject the property to the payment of her debt, but the decree was denied in the lower court, and judgment affirmed by the Indiana Supreme Court. “We are unable to see,” it was observed, “how the rights of a creditor are in any way impaired in case his debtor in good faith either sells or gives away property which is exempt, and beyond the reach of any process which might be invoked for its subjection, even in the hands of the debtor. It is only where the debtor voluntarily disposes of property which the creditors might have subjected to the payment of this debt that the law raises an inference of fraud.” (Faurote v. Carr, 6 West. Rep., 281.) (1886.)

Sureties of a Failing Debtor may Protect themselves by Buying his Stock of Goods, though Creditors may be Hindered and Delayed.—One Besel, on the 22d of March, 1883, made a mortgage to Meyer on his stock of goods, to secure a debt of \$450. One Schivelblin, about the same time, sued Besel for a debt of \$400. Regenhardt, Kempe and Popp, being sureties for Besel, became alarmed, and on the 26th of April following purchased Besel's entire stock of goods, agreeing to pay him therefor \$2,100. They received a bill of sale, and at once took possession of the property. In payment therefor they gave their notes to Meyer and Schivelblin, and thus satisfied the mortgage and pending suit. They also gave their notes to other persons in payment of debts of Besel, upon which they or one or more of them were sureties. The debts thus assumed, including a rent account, amounted to about \$2,000. Other creditors brought suits and attached the property. Regenhardt, Kempe and Popp interpleaded, setting up their purchase. An attaching creditor took issue,

alleging that the sale was fraudulent. The Missouri Supreme Court reversed a judgment of the Cape Girardeau Court of Common Pleas against the interpleader, saying—"The evidence in general tends to show that the interpleaders paid for the goods the fair value, and that they purchased the same for the sole purpose of protecting themselves, because of their suretyship for Besel on the debts assumed. They had a perfect right to buy the goods for that purpose, though the purchase might operate to hinder and delay the other creditors in the collection of their demands, and though to their knowledge Besel intended the sale should have that effect, provided they did not participate in the fraudulent purpose of Besel." (Albert v. Besel *et al.*, 8 Western Reporter, 305.)

After Admitted Insolvency, and Offer of Settlement by Composition, Persistence in Carrying On the Business.—Creditor's Right to Injunction and Receivership.—A firm of grocers doing business in Petersburg, Va., sent the following circular to their creditors:

PETERSBURGH, 18th June, 1884.

To _____.

DEAR SIR:

We owe by bills payable and open accounts,.....\$26,552.19
Our assets are stock in hand, bills receivable and open accounts
that we consider good,..... 14,156.81

We offer to our creditors fifty cents on the dollar, to be paid as follows: Twenty cents on the dollar, first November, 1884; twenty cents on the dollar, on the first March, 1885; and ten cents on the dollar in cash as soon as our banks begin to discount paper, which we believe will be in a very few days. The deferred payments to carry interest at the rate of six per cent per annum. We make no preferences, but make the same proposition to all. Please let us hear from you at as early a date as practicable.

Yours truly, PATTERSON, MADISON & Co.

The facts are further recited, as follows, in the opinion of Judge Hughes, of the United States Circuit Court, Virginia, E. D., before whom the case came on a bill asking for the appointment of a receiver:

"Meanwhile, and until the 8th of July, their business went on as before, except that they discharged two clerks, and made purchases of only such goods as were necessary to fill orders, buying both for cash and on credit. They continued to collect and sell, and they paid some of their debts in full. More than a majority of their non-resident creditors answered

accepting their proposition of compromise; a few of them accepting absolutely, but most of them in a form more or less qualified and conditional. The complainants and one or two other creditors refused to accept. In the course of a short time their proposition for compromise, after its acceptance as aforesaid, assumed features not contained and expressed in the circular of June the 18th, among them, the avowal that some of their creditors had been and others would be, paid in full. The claims of these creditors, it was pretended, were 'confidential debts which stood upon the highest ground of personal honor and obligation.' One of the creditors, in a conversation with the debtors, on the first of July, pressed them to make an assignment, but they refused, and gave him the impression that if any creditor should annoy them by suit they would leave him out, or postpone him to the other creditors. The business went on until the 8th of July, when the marshal of the court took possession, under an order, returnable on the 10th, to show cause why a receiver should not be appointed, and why a preliminary injunction against interference with the effects of the firm should not be granted."

In rendering judgment, the Court said—"The case is in its facts a novel and peculiar one. I do not know any case like it in the reports. * * * The bill complains that the defendants refuse to make assignment of their effects for the payment of their creditors; that the firm have no credit, and are still going on with a feeble and crippled business, consuming by expenses the fund out of which creditors must be paid; that defendants announce their purpose thus to continue their business until October if necessary. * * * *

"From and after the acceptance by any creditors of the proposition for compromise made by the defendants on the 18th of June, 1884, all the assets of the firm, including property and choses in action, became a trust fund expressly dedicated to the payment, without preferences, of the fifty per cent of debts promised by the circular letter. Offering no indorsements, tendering no security, insolvent themselves, their proposition could be nothing else than a dedication of their assets to the fulfillment of the terms of the composition.

* * * * There was the case of a firm, which after

dedicating and being presumed by law to have dedicated all their effects as a trust fund to the payment of all their debts *pro rata*, yet going on with the business as if the property was still their own, paying off debts in full, and subjecting an exceedingly perishable trust fund to the hazards and losses of a business which had brought them while in good credit to hopeless bankruptcy. * * * The crucial question is whether equity has any remedy for such a state of things.

* * * * * There is but one mode in which complainants can insure the application of these assets to the purposes of the trust imposed upon them, and that is by the intervention of the court through the instrumentality of a receiver and an injunction." Decree was made accordingly. (Fink v. Patterson, 21 Federal Reporter, 602.)

DEEDS.

Absolute Deed Intended as a Mortgage.—Parol Evidence of Intent must be Convincing.—C. conveyed to P., by an absolute deed, a tract of land for a consideration of \$20,000, taking back a mortgage for the amount in four equal promissory notes. Afterwards C. claimed that the deed was intended as a mortgage, P. to hold the land until he could sell it to advantage, and divide the profits with C. The latter brought a bill in equity to have it so declared. There was no written evidence to contradict the tenor of the instrument. In the lower court it was held that the agreement set forth, if valid, would make C. a beneficiary under the deed, would create a trust in P. concerning or relating to land, and not being in writing and properly signed, was void under the statute of frauds. In the United States Supreme Court, the judgment in favor of P. was affirmed, but on a different ground, as follows:

"If the conveyance is in fee, with a covenant of warranty, and there is no defeasance, either in the conveyance or a collateral paper, parol evidence to show that it was intended to secure a debt, and to operate only as a mortgage, must be clear, unequivocal and convincing, or the presumption that the instrument is what it purports to be must prevail." (Cadman v. Peter, 118 United States, 73.)

Agreement to Exchange Warranty Deeds.—Acceptance of One without Warranty.—No Relief in Equity against Incumbrance.—When Written Instrument Cannot be Reformed.—In delivering the opinion of the New York Court of Appeals (*Whittemore v. Farrington*, 1879, 8 Rep., 506,) Judge Rapallo stated the following facts and principles:

“A party who under a verbal agreement for the conveyance to him of lands is entitled to insist on a good title and a deed with covenants, pays the consideration and is then tendered a deed without covenants. He demands a deed with covenants, and this is refused; he then accepts a deed without covenants, and believing the title to be clear, records it, and continues to keep and improve the property. An incumbrance at the time unknown to both parties is afterwards discovered. It is conceded that no liability rests upon the grantor in such case. In the absence of fraud or covenants a purchaser takes the title at his own risk. Then do these facts thus stated entitle the plaintiff to any equitable relief? We think not. It is beyond the power, even of a court of equity, to make contracts for parties. The jurisdiction to reform written instruments in cases free from fraud is exercised only where the instrument actually executed differs from what both parties intended to execute and supposed they were executing. And a mistake will be corrected in equity only on the clearest proof, and then only by making the instrument conform to what both parties intended. But an instrument or covenant, the nature and contents of which are fully comprehended by both parties at the time of its execution, cannot be altered in its terms by the court.”

Conveyance not Delivered Gives no Title.—An agreement for an exchange of homesteads was made between Platt Smith and Mrs. Waite. An agent of W., in order to clear her title from a tax lien, redeemed and had the tax deed made to S. W. subsequently executed her own deed to S. and wife, and the two were filed by Herod, her agent, at the same time, for record. The heir-at-law of S. claimed that as the tax deed to him was prior in date it gave him alone the title, and W. had nothing afterwards to convey to him and wife. But the

Supreme Court said in reply, that "no title thereunder had vested in Smith, because the deed had never been delivered to him; which deed, in fact, as we have said, was never delivered to Smith, but was filed for record by Herod under the belief that such was the best way to perfect the title. Before it was filed the deed from Mrs. Waite was executed. Smith had knowledge of this deed, dictated it, and under it the title vested in Platt Smith and wife as joint tenants or tenants in common, and the former could not procure a tax deed to the prejudice of his co-tenant." (Smith v. Smith, 68 Iowa, 608.)

Conveyance of Dower Right.—Description of Interest Conveyed.—Fee-Simple Interest, Derived by Ascent, left in Grantor.

—On the 29th of January, 1869, Mary E. Holman, widow of Solomon Holman, made a deed to Aaron N. Dukes, of her dower right in a certain piece of land, conveying "all her right, title and interest, the same being a life estate in the undivided one-third part" of the property; "the said grantor, her heirs and assigns, hereby covenanting with the grantee, his heirs and assigns, that the title and interest in and to said premises hereby conveyed is clear, free, and uncumbered; and that she is lawfully seized of the premises aforesaid as of a sure, perfect life estate of inheritance, and that she will warrant and defend the same against all claims whatever." At the time these covenants were made Mary E. Holman was not only the owner of a life estate in the premises, but entitled to a fourteenth interest in fee-simple, derived by inheritance from one of her children, who died after her husband, but several years before her conveyance to Dukes. She brought a partition suit to recover this interest. It was urged in defense that Dukes purchased without any knowledge that there had ever been such a child; that he platted the property into lots and made permanent improvements thereon; that he bought and paid for the interest of all the other children, paying full value for the land; that with full knowledge of the death of the child in question, Mrs. Holman falsely represented that she held only a dower interest in the land, and that she was thus estopped from claiming any other interest. The Miami County (Ind.) Circuit Court

decided the case on demurrer in favor of Dukes, but the judgment was reversed by the Supreme Court of Indiana. Said the Court—"All the interest that Mrs. Holman assumed to convey, and all that she did convey, was her interest in dower as widow of Solomon Holman. * * * If the appellee contracted with her for a life interest, and got what he contracted for, he has no cause for complaint against her. * * As he received the interest he bargained for, he cannot insist that, as she did not convey all her interest she is estopped." (Holman v. Dukes, 8 Western Reporter, 386.)

An Unrecorded Deed, Accompanied by Possession and Acts of Ownership, is Good against Subsequent Judgment Creditors.

—Stephen White, in 1865, made a deed of land to his son John C., who gave in return an agreement to provide a home and support for his father during life. Stephen White was at this time free of debt, and had considerable other property. The deed was delivered but not recorded. The son entered into possession, claimed ownership, and exercised all the rights of an owner. In 1879 Stephen executed another deed to his son John C. and wife, for the same consideration, and the latter deed was recorded. Meanwhile, in 1877, Stephen became surety on a bond, and in 1880 judgment against him as such surety was entered, execution levied on the land in question, and a bill filed to set aside the deed of 1879, as an obstruction to the levy. In defense John C. and wife set up the deed of 1865, and the Illinois Supreme Court holding that it was valid, and passed the title, said that the validity or invalidity of the deed of 1879 was a matter of no moment. Relative to the want of record, it was said—"The object of recording a deed is to afford subsequent purchasers or incumbrancers notice; but the recording of a deed is not the only method under which such persons may receive notice of a conveyance. Where a person purchases a tract of land, and obtains a deed, and enters into the possession of the land, and continues in the possession as owner, such possession is notice to all the world of the grantee's rights in the premises under his unrecorded deed. As held in Coan v. Olsen, 91 Ill., 273, actual occupancy is equal to the record of a deed under which the occupant claims, and the purchaser is bound to

inquire by what right or title he holds." (Higgins v. White, 6 Western Reporter, 345.) (1886.)

With regard to the consideration for the deed, it was said—"In 1865, when Stephen White executed the deed conveying the land to his son, he was free from debt; he retained on his premises after this conveyance \$10,000 worth of property, under which circumstances, if he saw proper to make a settlement on his son, who was an only child, he had a right to do so. * * * Higgins cannot complain unless he was a creditor at the time, which he was not, or unless the conveyance was made by White with a view of contracting future fraudulent indebtedness, which does not appear."

Boundaries.—Conveyances.—River Banks as Boundary Line.—A deed contained the following description: "Beginning at a stake and stones on the west bank of the Unadilla river," thence going by courses and distances around the tract "to the Unadilla river; * * * thence down the west bank of the Unadilla river as it winds and turns to the place of beginning." The New York Court of Appeals, in fixing the boundary line in this case, held that if the expression had been "to the Unadilla river" the line would have been carried to its centre, but here the starting point was unequivocally from the bank and not the centre, and Judge Selden said—"From the terms of the deed I think it must be held to convey the farm to the west bank of the river only, leaving the title to the river and the land covered by it in the grantor." (Babcock v. Utter, 1 Abb. Ct. App., 27.)

"Is there enough in the language used here," asks the Court, "to exclude the street from the conveyance? The mere mention in the description of a fixed point on the side of the road as the place of beginning or end of one or more of the lot lines, does not seem to be of itself sufficient; nor will similar language, with reference to monuments standing on or near the bank of a stream, in lines beginning or ending at such stream, prevent the grantee from holding to the middle of the water. * * * Had the plaintiff run his first line 'by the north-easterly side line of said road,' instead of 'by said road,' and conveyed the land 'lying between the south-westerly side line of said road and Mousam river,'

instead of that 'lying between said road and Mousam river,' a different question would have been presented." The Court accordingly held that the grantee under the deed owned to the middle of the road.

Another deed described the property conveyed as "Beginning on the east side of the Bloomingdale road, at the southerly corner of lot No. 2 * * * and running thence along the southern boundary of the same south, thence to the north-east corner of lot No. 4, * * * thence along the same north to the Bloomingdale road aforesaid, thence along the said road, five chains to the place of beginning." In construing this description the Court said—"The point of beginning is given as 'the east side of the Bloomingdale road.' The effect is to make the east side of that road a fixed monument to mark the starting point of survey, and it is impossible, without doing violence to the language used, to transfer that monument to the centre of the Bloomingdale road." (Lee v. Lee, 27 Hun, 1.)

In another conveyance the description ran as follows: "Beginning at a point on the southerly side of the Wallabout bridge road; * * * thence running other courses, thence along the land of Jacobus Lott north 48 deg. and 9 min., west 594 feet to the Wallabout bridge road, and thence along said road to the place of beginning." Here the New York Court of Appeals held that the road-bed was excluded by the terms of the description. (Kings County Fire Insurance Company v. Stevens, 1882.)

Per contra, the Wisconsin Supreme Court has held that a deed bounding by the south side of a street conveyed title to the centre; (Kneeland v. Van Valkenburg, 46 Wis., 434; and the Supreme Court of Pennsylvania holds that "nothing short of an intention expressed *in ipsius verbis* to exclude the soil of the highway, can exclude it." (Paul v. Carver, 26 Penn. St., 223.)

Deed of Land Bounded by Highway.—Title Extends to Centre when.—When Stops at the Side.—"The well settled doctrine in this State," said the Supreme Court, in *Low v. Tibbetts*, (72 Maine, 92,) "is, that a grant of land bounded on a highway

carries the fee in the highway to the centre of it, if the grantor owns to the centre, unless the terms of the conveyance clearly and distinctly exclude it, so as to control the ordinary presumption." The description in the deed was as follows: "Situate in the village of S. * * * beginning on the north-east side of the new road, * * * and at the southerly corner of the lot as now fenced, * * * and running (course given) by said road * * * to a stake, and thence around the rear of the lot to the place begun at; also the land now owned by said Low and Mousam river."

Contradictory Grants.—After a Fee-Simple is Given, a Subsequent Repugnant Disposition of the Estate is Void.—In a deed executed by H. Newman, in consideration of \$5 and natural love and affection for his daughter, A. R. Winter, he granted and assigned "unto the said A. R. Winter, her personal representatives and assigns, separate and apart from her said or any future husband," certain leasehold property, "the said A. R. Winter to have and to hold the hereinbefore described property for and during her natural life, and at her death the said property to go and descend to her children by her present or any future husband, and their descendants, in equal shares, *per stirpes*; but in case there should be no children, child or descendants of the said A. R. Winter that shall survive her, then the said property to revert to and become vested in the other child or children or their descendants of the said H. Newman, that may be alive at the death of the said A. R. Winter, in equal proportions as the heirs of the said H. Newman, *per stirpes*, and not *per capita*."

"By the premises of this deed," said the Maryland Court of Appeals, "an absolute and unqualified interest is given to the daughter, and by the *habendum* that interest is cut down to a life estate, with contingent limitations to her children and the heirs of the grantor. The repugnancy between the two is apparent and irreconcilable." The Court applied the rule as stated in Blackstone (2 Com., 98)—"if a grant be to one or his heirs in the premises, *habendum* to him for life, the *habendum* will be utterly void," and the estate was held to

pass absolutely to A. R. Winter and her heirs. (Winter v. Gorsuch, 8 North-East Reporter, 307.)

Delivery of Deed to Effect Transfer of Property.—PECKHAM, J., delivered the opinion of the Court.

This action was brought by the plaintiff to set aside and have declared void a deed said to have been executed by one Emma D. Owen to Isaac Nelson and Mary Ann Nelson, her father and mother. The deed conveyed certain premises in the county of West Chester belonging to Mrs. Owen, and it was recorded in the clerk's office of that county within a few days after it was executed, which was on the 20th of December, 1862.

In 1867 the grantor in the deed, who with her husband continued to occupy the premises, executed a mortgage thereon to one Todd for the purpose of securing the payment of \$4,000. Subsequently another mortgage was executed by her to the same mortgagee for the purpose of securing the sum of \$2,000 additional, made up in part of the interest due on the \$4,000 mortgage and the balance in cash advanced. Subsequently an action was commenced to foreclose both mortgages which proceeded to judgment; and a decree of foreclosure was rendered and the premises were sold under that decree and bid in by the mortgagee. No judgment for deficiency was ever entered up against the mortgagor. The mortgagee having received the referee's deed, upon seeking to obtain possession was confronted with the deed of the premises executed in 1862 to said Nelson and his wife; and he found defendant, Isaac Nelson, (his wife having died,) in possession, claiming to own the premises by virtue of said deed.

This action was tried before a judge without a jury and resulted in a judgment for the plaintiff setting aside the deed from Mrs. Owen to her father and mother, and adjudging the title to have been in her at the time of the execution by her of the mortgages above mentioned, and adjudging that the plaintiff was entitled to the immediate possession of the said premises. An appeal from that judgment was taken to the General Term, where it was reversed and a new trial granted; but the order granting such new trial did not state that the judgment was reversed on questions of fact.

The first question which arises here is upon the finding of fact made by the trial judge that the deed from Mrs. Owen to her father and mother was never delivered by Mrs. Owen to them or either of them, nor did she ever authorize any person to deliver such deed to such grantees or either of them. As the judgment of the Special Term was not reversed on any question of fact, if there were any evidence to support the findings above stated, it is conclusive upon us upon this appeal. But if there were none, and an exception was duly taken to the finding, a question of law is raised which is receivable here.

At the outset the plaintiff claims that no proper exception has been taken to the finding referred to, because the judgment includes in that finding the facts that the deed was voluntary and without consideration, and that the same was never delivered by the grantor or by any one authorized by her; and he says that there is but one exception to a finding which thus includes three different facts, and that under the ruling in *Ward v. Craig*, 87 New York, 550, 557, the exception is unavailing.

The exception in that case was "to the twenty-fifth finding of fact by such referee, and to each and every part thereof," and there were in that finding separate and distinct findings of fact upon separate, distinct and independent subjects. The exception was treated as a general exception to the whole finding, and as one of the findings upon a separate and distinct subject was clearly sufficiently authorized by the evidence, the exception was held to be unavailing. But the language used in this case, we think, can fairly be regarded as a separate exception to each separate fact contained in the finding. The counsel for defendant stated in his exceptions as filed, that "he excepts to all that part of finding number 11, which finds that the deed therein mentioned given by Emma D. Vernol, was without any real consideration, and that the same was never delivered by the said Emma D. Vernol to the said Isaac Nelson, and Mary Ann, his wife, and that the said Emma D. Vernol never delivered the said deed to any person or persons for said grantees therein named."

We think this is substantially to be regarded as an exception to each of those findings, within any fair definition of the rule requiring exceptions to be filed to the decision of a court or to the report of a referee.

Too minute a subdivision of exceptions is not to be required in such a case. It is sufficient if the attention of the opposite counsel and of the trial court or referee shall be called to the particular point upon which the exception rests. Having done that the exception has filled its purpose, and nothing more should be required.

Upon a careful review of the evidence and of the pleadings and the course of the trial as manifested in the record, we are of opinion that there was no delivery of this deed is not supported by any evidence in the case, and is against the existence of a fact which was assumed upon the trial and charged in the complaint. By the complaint itself, taking it altogether, it is perfectly apparent that it proceeded upon the ground of the execution and delivery of this deed. It assumes that such an instrument has been executed and delivered; and upon such assumption it bases the allegations contained therein that the grantor was a woman of weak mind, and did not know or have any idea of the nature of the instrument she was executing, and that she executed it solely upon the representations of the grantees that it was a paper of no importance, and which in nowise affected her rights or interests.

The complaint also contained the allegation that the grantees in the deed obtained said conveyance in the manner above stated, and with the view and intent of defrauding the creditors of the said Emma D. Owen, and for the purpose of delaying and defrauding this plaintiff in the collection and obtaining payment and satisfaction of the moneys loaned as aforesaid. This examination of the complaint furnishes conclusive proof that it proceeds upon the assumption that a deed such as is described therein was given by Mrs. Owen and was received by the grantees, but that the whole thing was done for a fraudulent and illegal purpose.

No one would ever suspect on looking over the complaint that any issue could be made in regard to the delivery of the

deed in question. The answer admits by not denying the execution of the deed, and then denies that the grantor did not know the character of the instrument she was executing, or that she supposed it was a paper of no importance which in no way affected her rights or interests; and it denies that any such representations as alleged in the complaint were made at the time of the execution of the said deed, by the grantees or by any other person.

It then set up reasons which existed in the minds of the grantees at the time of the execution of the deed, calling for its execution, and set up the fact that it was duly executed and delivered by the grantor to the grantees, at the time it bore date.

A careful perusal of the evidence on the trial conclusively shows that a delivery as following the execution of the deed was assumed. A fact assumed is to be regarded as proved or admitted. (*Paige v. Fazackerly*, 36 Bart, 592; *Cooper v. Bean*, 5 Laws, 318.)

It is perfectly apparent that the word *execution* when spoken of in the record, in reference to the execution of the deed, was used by both sides as tantamount to execution and delivery, as embracing all that was necessary to make a formally valid conveyance by deed. Both sides, in the examination of Mrs. Owen and her brother, used language which assumed that the formal things necessary to be done in the way of executing and delivering this instrument had been done; and the plaintiff's counsel in the examinations of Mrs. Owen and her brother spent considerable time in endeavoring to find out what the motive or intent of Mrs. Owen was in the making of this deed. From the context it appears clearly that the word *execution* was, as I have said, meant to include the whole formal part necessary for the operation of the deed as a complete instrument.

The learned counsel for the plaintiffs, before this Court, in endeavoring to meet the claim that there was no allegation in the complaint of a non-delivery of the deed, stated that there was no objection interposed on the trial to any of the proof on that ground. There was no proof in the case offered by either party, and no point raised, so far as this record

shows, upon the question of delivery; and so there was no opportunity to object to any thing of that kind. The evidence as to the execution of the deed was admitted on the question at issue under the pleadings, which was that of fraud; it was not directed to the specific fact of a delivery separated from and independent of the general fact of the execution of the deed.

The plaintiffs should not now be permitted to claim that there was no proof of this independent fact of delivery, when, as has been said, the existence thereof was not only assumed on the trial, but in addition it was substantially charged in this complaint. The finding of the trial court, therefore, (that there was no delivery of this deed,) being at war with the pleadings and in opposition to the fact assumed throughout the trial, and having been properly excepted to, was an error of law receivable in this Court.

The finding of non-delivery being thus an error of law the General Term was right in granting a new trial; and we must affirm the order, unless it shall appear that upon the other findings in the case, assuming that there was a delivery of the deed, the judgment of the trial court was necessarily correct.

This makes it necessary to look still further into the record; and the first question that meets us is as to the finding of the trial court upon the question of fraud. If there were a delivery of the deed, and no fraud in its purpose, of course that is an end of the case; and it is not necessary to inquire further as to whether the action could be maintained if there were a delivery of the deed and a fraudulent purpose accompanying it on the part of the grantors.

The Court found that prior to September, 1862, it was known to her parents that their daughter, Mrs. Owen, then Mrs. Vernol, was about to marry, and that in such event she intended to occupy and carry on the farm she owned through the agency of her intended husband, John Owen. It was further found that the parents and daughter, believing that the marriage was hazardous, and that indebtedness would arise and losses be sustained, with a view to entering into the

marriage and engaging in the farming business, and to leave the farm to Mrs. Owen and protect the same from her future creditors, agreed that the daughter should convey the farm to her parents; and they promised to hold the title to the same in trust for her, and she should continue in possession of the premises and enjoy the proceeds and income thereof; and in pursuance of such agreement the deed was executed, and soon thereafter she went into the occupation of the farm with her husband, engaged in the business of farming and sustained heavy losses therein, and became totally insolvent.

The Court further found that the deed was colorable only, and made with intent to defraud the creditors of the grantor, and with intent to defraud the subsequent mortgagee, the plaintiffs' intestate. These findings were duly excepted to by defendant's counsel.

Of course the same rule holds in this instance as was stated in regard to the findings made by the trial court that there was no delivery of the deed, and if there be any evidence to sustain these findings of fraud we are concluded by them. A careful examination of the whole evidence in the case satisfies us that there is none upon which the finding of the learned trial judge can be based. The Court found (and the evidence upon that point fully sustains the finding,) that at the time when this deed was delivered the grantor owed no debts whatever, and she had in addition to the farm in question some personal property and money, which together amounted in value to \$19,000, and the deed was placed on record within four days of its execution.

The theory upon which deeds, conveying the property of an individual to some third party, have been set aside as fraudulent (in regard to subsequent creditors of the grantor) has been that he had made a secret conveyance of his property. While remaining in the possession and seeming ownership thereof, and has added credit thereby, while embarking in some hazardous business requiring such credit, or the debts which he has incurred were incurred soon after the conveyance, thus making the fraudulent intent a natural and almost a necessary inference; and in this way he has been enabled to

obtain the property of others who were relying upon an appearance which was wholly delusive. Such are the cases cited by the learned counsel for the appellants.

But here the grantor was not about to engage in business within the meaning of that term as used in the cases; she was simply going to live on the farm with her husband, and presumably off the products thereof. She had \$19,000 in personal property, and the farm was then worth about \$6,000. She was wholly free from debt. The deed was placed on record at once. It was four years and four months thereafter before the first of the mortgages was executed to plaintiffs' intestate, and eight years and four months before the second was executed.

Under such circumstances we think it is too much to say that there was any evidence at the time she executed the deed that the grantor meant to defraud creditors. On the contrary, no such inference can be drawn. The parties evidently (or at the least the mother,) were fearful in regard to the marriage, and decided that at least some part of the property which she possessed should be saved to the grantor from the husband's possible future misfortunes. That years after the execution of the deed, which was on record, the grantor at the request of her husband should mortgage the farm, and should make an affidavit that she was the owner thereof, however it may show an intent to defraud the mortgagee at that time, does not, we think, show that the purpose of the deed executed more than four years prior thereto, at a time when she was largely solvent, was to defraud this mortgagee or any subsequent creditors, not one of whom was shown to exist earlier than the above stated time of more than four years from the execution of the deed. She swears distinctly that her purpose was to give the farm freely and wholly to her parents and the survivor, and she may have felt full confidence in their intention to treat her with kindness.

We have not gone at length into the evidence. On the contrary we have given only a partial review of it; and we feel convinced that it cannot be regarded as furnishing any support for the finding of fraud, as made by the trial court.

This conclusion renders it unnecessary to enter upon the examination of any further question in the case. The deed being delivered and there being no fraudulent purpose which caused its delivery, the title was in the grantees at the time Mrs. Owen assumed to mortgage the farm; and the plaintiffs cannot maintain this action. The equities in favor of the plaintiffs are very strong indeed. Their intestate advanced his money, believing that his mortgage was a lien on the farm. But he had the opportunity at all times before loaning any money to resort to the record in the clerk's office; and the least attention given thereto would have led to the discovery of this deed. He saw fit to trust to the declarations of Mrs. Owen, and these plaintiffs must sustain a heavy loss in consequence thereof.

The order of the General Term granting a new trial must be affirmed, and judgment absolute rendered against the plaintiffs, in accordance with their stipulation, with costs.

All concur, except Earl and Gray, J. J., dissenting.

DEFINITIONS OR TERMS.

(SEE ALSO GLOSSARY, PAGE 563.)

What Constitutes "One Calendar Month."—The governor of Coldbath Fields Prison, England, was sued for illegal detention of a person who had been sentenced for an assault to imprisonment for "one calendar month;" and for a second assault, for the further term of fourteen days, beginning at the expiration of the first term. He was taken to the prison on the afternoon of October 31st, and demanded his release on the 13th of December, but was held until 9 A. M. of the 14th. The British Court of Appeal admitted the plausibility of the prisoner's argument that "he had been imprisoned during the whole of November and one day of October as constituting a calendar month," but Justice Bramwell laid down the following rules for reckoning the period:

"The difficulty really arises because the term 'calendar month' is not applicable except as applied to particular months, and that it is inapplicable where the month begins in the middle of a particular calendar month. Then the month is made up of a portion of two calendar months, which

may be of unequal lengths, and various consequences seem to follow. It is clear that the only sensible rule which can be laid down is this, that where the imprisonment begins on a day in one month, so many days of the next month must be taken, if there are enough days to do it, as will come up to the date of the day before that on which the imprisonment commenced. That is to say, that if the day of imprisonment commenced on the 5th of the month, it must go on until the 4th of the next month; if on the 29th, until the 28th. * * As the plaintiff was sent to prison on October 31st there were thirty days wanting from the next month, and as a consequence the month did not expire until the 30th. Then the fourteen days did not begin until the 1st, and the plaintiff was therefore duly kept in prison until the 14th." (*Migotti v. Colville*, 40 L. T. R., N. S., 746.)

Fellow-Servants.—Locomotive engineer and conductor are not. (*Chicago, Milwaukee and St. Paul Railway Company v. Ross*, United States Supreme Court, 1884.) There have been decisions in New York, Indiana, Michigan, and other states, to the contrary.

Landing Goods.—"Putting them on land, or upon that which by the custom of the port is its equivalent." (*Houlder v. Merchant Marine Insurance Company*, Law Rep., 17 Q. B. D., 355.) The goods in question were insured "until safely landed," and were discharged in lighters, for transshipment. The transfer to lighters was held to be equivalent to landing.

Mercantile Partnership.—A coal and oil mining association is not. A mercantile partnership is one which habitually buys and sells, which buys for the purpose of afterwards selling. (*Com. Nat. Gas Co.*, Pennsylvania Common Pleas, 31 A. L. J., 425.)

Shop.—The office of a loan company, where it keeps its collaterals and sells them when not redeemed, is a "shop." (*Boston Loan Company v. City of Boston*, 137 Mass., 332.)

DRAFTS.

Payment of Drafts.—A Question of their Acceptance.—William Stallcup *et al.*, assignees, etc., appellants, against the National Bank of the Republic, respondent.

Appeal from judgment entered upon the dismissal of the complaint at Circuit at close of plaintiff's case.

The action is brought upon an alleged agreement of the National Bank of the Republic to pay certain drafts in favor of the firm of Lamborn & Gray, drawn upon and accepted by the Cleveland, Youngstown & Pittsburg Railway Company. The plaintiffs sue as the assignees of Lamborn & Gray.

Held, that there was no contract or promise on the part of the authorized officers of the bank to pay the drafts, and Mr. Lamborn sent them at his risk, and his firm could not recover thereon without proving an authorization in fact. The complaint was dismissed and the judgment affirmed with costs.

BARTLETT, J.—This action is brought upon an alleged agreement by the National Bank of the Republic to pay certain drafts in favor of the firm of Lamborn & Gray drawn upon and accepted by the Cleveland, Youngstown & Pittsburg Railway Company. The plaintiffs sue as the assignees of Lamborn & Gray. The interview upon which they rely as constituting the contract took place on November 8th, 1883, between Mr. Lamborn and Mr. Ford, the president of the bank, who was at the same time also president of the railroad company. Similar drafts had previously been paid at the bank, but just prior to this date there had been "some little hitch" in the matter, according to Mr. Lamborn, and he came from Ohio to New York, by way of precaution, and went to see Mr. Ford at the bank. He asked Mr. Ford what the trouble was, and why the drafts could not be taken care of at sight. Mr. Ford responded that there was trouble in the bank, among the bank people and himself and Mr. Buckley, who was the vice-president of the bank. He said the bank directors, or some of the directors, were dissatisfied with the advances to the railroad, and he asked Mr. Lamborn as a favor to him

and Mr. Buckley, who were "in some trouble with the bank people," to draw as lightly or sell exchange as lightly as possible against the credit of his firm in the bank.

Mr. Ford then went on to say that the bank held a large quantity of the bonds of the Cleveland, Youngstown & Pittsburg Railway Company, the value of which depended upon the line being completed and ironed to a certain point, and that it was within a few weeks of completion; that a man was in Europe attempting to negotiate the bonds, and that he desired Lamborn & Gray to make further advances to the railroad company, as they had previously, "drawing drafts, and accompanying these drafts with vouchers approved by the officers of the railway company and sending them to the Bank of the Republic for collection, and they would take care of them to the last dollar." He used the words "to the last dollar."

Mr. Lamborn further testifies that Mr. Ford said he might possibly lose his place in this trouble with the bank people.

It may be of some importance to note that Mr. Bergholz, the vice-president of the railroad company, was present during part of the conversation.

If an agreement to pay the drafts which were dishonored is to be found any where in the case it must be in this interview.

In the first place, it may be well doubted whether Mr. Ford in giving Mr. Lamborn the positive assurance that if he sent on his drafts to the bank for collection, "they would take care of them to the last dollar," was not speaking of himself as president of the railroad company, and of Mr. Bergholz as vice-president, rather than in his character as president of the bank. But assuming that he professed to represent the bank, there is not only an entire lack of evidence of his authority to make the contract in question in its behalf, but there is proof of a state of facts disclosed to the plaintiff's assignors which preclude them from relying upon any implied authority on his part. That the directors had already made trouble for Mr. Ford by reason of the advances to the Cleveland, Youngstown & Pittsburg Railway Company was a fact distinctly communicated to Mr. Lamborn, and was notice to him that

further transactions of the same nature would not be sanctioned. Having this information, if he chose to rely upon the promise of Mr. Ford, he took the risk of the existence of actual authority to make such promise in behalf of the bank, and his firm could not recover thereon without proving an authorization in fact.

The complaint was properly dismissed, and the judgment should be affirmed with costs.

I concur.

FRANCIS A. MACOMBER.

DRUMMERS.

Right to Sell Without License.—One Robbins, a traveler for a Cincinnati stationery firm, in the discharge of his duties, visited Memphis, technically called "The Taxing District of Shelby County, Tennessee," and began soliciting orders. A state law of Tennessee subjected all drummers offering or selling goods by sample to a tax of \$10 a week, or \$25 a month. Robbins refused to pay a penny. He was arrested and fined by the Tennessee courts. He carried the case to the Supreme Court of the United States which reversed the decision. Justice Bradley took the ground that the state law, for breaking which Robbins was fined, was clearly unconstitutional. The power to regulate commerce between the states is vested by the constitution exclusively in Congress. The failure of Congress to act in the matter of taxing drummers, indicates its will that they should be left free from any imposition or restriction of that kind. If the presence and activity of drummers in any community constitutes a menace or injury to local trade, the remedy of the local tradesmen (and the only remedy) lies in an appeal to Congress for regulating legislation in the premises. Congress, and Congress alone, can afford relief. To allow the several states, each on its own hook, to regulate and tax the drummers at their discretion would be, to throw the commerce of the country into confusion; to turn back the hands on the clock a hundred years, and to find ourselves in the disorders that prevailed under the Articles of Confederation. A state cannot impose taxes upon persons passing through or coming in merely for

a temporary purpose, nor upon property imported and not yet become part of the common mass, and no discrimination can be made by any such regulations adversely to the persons or property of other states, and no regulation can be made directly affecting interstate commerce. In the matter of interstate commerce the United States are, in the opinion of this Court, but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. It seems to be forgotten that the people of this country are citizens of the United States as well as of the individual state, and that they have some rights under the constitution and laws of the former, independent of the latter, and free from any interference or restraint from them. (*Sabine v. The Taxing District of Shelby County, Tenn.*, U. S. Sup. Ct. Rep., 1886, vol. 120, p. 489; also a more important case, *George W. Corson v. The State of Maryland*, U. S. Sup. Ct. Rep., 1886, vol. 120, p. 502; also *Asher v. State of Texas*, U. S. Sup. Ct., Oct. 29, 1888, reported in "Railway and Corporation Law Journal," Jan. 5, 1889, vol. 5, No. 1.)

EMPLOYER AND EMPLOYEE.

Liability of Employer for Injuries to Employee.—Fellow-Employee's Negligence.—Railway Conductor and Engineer.—It is a case of frequent occurrence that persons in a common employment are injured in consequence of each other's negligence, and the general rule is that persons thus employed take upon themselves this risk, provided that the employer is not negligent in taking them into or retaining them in his service, or in furnishing suitable materials and machinery for the work to be done. But unless the persons concerned are engaged in a "common employment" the rule does not apply, and the employer becomes liable. The question what constitutes such "common employment" becomes therefore one of leading importance in all such cases. As often occurs in matters of this kind, the courts are much at variance in their conclusions. There are in this country, as remarked by the United States Supreme Court in *Chicago, Milwaukee & St. Paul Railway Co. v. Ross*, (1884,) "many adjudications of great learning, restricting the exemption to cases where the fellow-servants are engaged in the same department, and act

under the same general direction;" or as held in England, where they are "men in the same common employment, and engaged in the same common work under that common employment." In Massachusetts a railroad engineer and a switch-tender were held to occupy that relation. (*Farwell v. Boston & Worcester Railroad Co.*, 4 Met., 49.) In the United States Supreme Court case cited, the engineer of a freight train was injured by a collision with a gravel train, resulting from the negligence of the conductors on both trains. There was a verdict against the railroad company for damages, and the Court said:

"There is, in our judgment, a clever distinction to be made in their relation to their common principal, between servants of a corporation, exercising no supervision over others engaged in the same employment, and agents of the corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence. A conductor, having the entire control and management of a railway train, occupies a very different position from the brakeman, the porters and other subordinates employed. He is in fact and should be treated as the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. This view of his relation to the corporation seems to us a reasonable and just one. * * * Subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned. * * * In no proper sense of the term is he a fellow-servant with the fireman, the brakeman, the porters and the engineer."

The Court accordingly affirmed the judgment against the company.

There are decisions to the contrary of this in several of the states.

Injuries Occasioned by Negligence of Fellow-Employee.—Employer not Liable.—Hass, a seaman employed on a vessel of the Philadelphia Southern Mail Steamship Company was acting as night watchman of the vessel while in port at New Orleans. A stevedore had charge of loading and unloading,

and had absolute control of the gangway planks and blocks. Arrangements had to be made by the use of blocks to keep the planks on a level with the levee, as the tide rose and sank. During the night this was not attended to, and Hass in consequence stumbled over the planks into the water, breaking his leg. There was some evidence that he knew the condition of the planks, and should have blocked them himself, or reported their condition to the officer of the deck, who was in charge of the cargo planks at night. Was the steamship company responsible for the seaman's injuries?

On all the facts as found by a jury, the Pennsylvania Supreme Court held the company free from liability, approving the judge's charge in the court below, to the effect that if Hass were guilty of contributory negligence he could not recover; that a man entering upon any employment assumed all the risks ordinarily and naturally belonging to that employment; that at the time of the accident the plaintiff was acting in his ordinary employment as sailor; that while a man did not assume risks not voluntarily belonging to his employment, and which are occasioned by the negligence of his employer, yet he did assume all risks arising from the negligence of those in the same common employment with himself. That where a man employed another who is engaged in a separate or independent employment he was not responsible for the negligence of that person, and that if the stevedore were in an independent employment, and the accident arose from his negligent placing of the planks, the plaintiff could not recover." (*Hass v. Philadelphia Southern Mail Steamship Company*, 1879.)

EXECUTION.

Husband and Wife.—Wife's Dower Preserved in Premises Mortgaged by Husband when Judgment is Pending.—S. executed a mortgage upon his property in which his wife joined about four years subsequent to the filing of a judgment against him.

Two years after the making of the mortgage the sheriff conveyed the property under an execution issued upon the old

judgment. The question arose as to the dower interest of the wife being subject to the mortgage.

The Court of Appeals in the very recent case (decided in October, 1886,) of *Hinchliffe v. Shea*, 103 New York, 153, held, that the wife, in joining with her husband in conveying or mortgaging his property, merely releases her future contingent right of dower in the premises, as a means or in aid of the deed or mortgage. She forfeits thereby all claim. But it is well settled, that in the event of the death of the husband where the property has been sold on a process under a judgment earlier than the mortgage, the wife regains her original right, and may recover dower as if she had not joined with her husband in the mortgage in the first instance. (*Robinson v. Bates*, 3 Metc., 40; *Malloney v. Horan*, 49 New York, 111; *Kitzmiller v. Van Rensselaer*, 10 Ohio St., 63; *Littlefield v. Crocker*, 30 Maine, 192.)

The joining of the wife became a useless matter as her release of future interest inasmuch as the title itself became defeated. (*Scribner on Dower*, Chapter 12, § 49.)

The reason for this is that the judgment creditor had a prior or earlier right or lien to that of the owner of the mortgage, and the same was perfected by the sale under the execution issued upon the judgment.

If the owner of the judgment realized on the sale a greater sum than would have reimbursed him the balance would go to satisfy the owner of the mortgage. (*Elmendorf v. Lockwood*, 57 New York, 322.)

EXECUTORS AND ADMINISTRATORS.

Wife.—An interesting and important case was decided upon the question whether a divorced wife, if the husband die intestate, is entitled to the administration of his estate or to a distributive share of his personal estate.

Mrs. M. obtained a decree of divorce and married before the death of her first husband. Upon his death she claimed an interest in his personal estate, which was very large, and a necessary party to the proceedings granting letters or authority to administer the estate.

It was declared that the decree in divorce destroyed all relations between her and her husband, and all future rights or interests are forfeited as to her. Provision having been made for her in the decree she can never, at law, be entitled to property or money of which he afterwards may become possessed. (See 103 New York, 284, citing cases of courts of the different states.)

Effect of Judgment Against them in their Representative Capacity.—L. obtained judgment against the executors of H. for a sum of money on a deficiency upon a foreclosure sale of real estate. H. had, after the making of a mortgage to L., transferred certain other real estate to K. and another. The Court of Appeals held that the judgment obtained against the executors in their representative capacity did not act as a lien upon real estate of H., and therefore that no execution could issue on the judgment so as to affect his real estate. That executions are issued against the personal estate of a deceased person upon a judgment entered against his executors or administrators.

It is well settled that no creditor, by any proceeding or by his diligence, can obtain any priority or preference over the other creditors of a deceased person, in the estate or assets of the same.

It is the bounden duty of executors or administrators to use diligence and care to recover or reclaim real estate that had been conveyed by the deceased for the purpose of hindering, delaying, and defrauding his creditors. (103 N. Y., 302.)

When not Excused for Neglect.—1. An executor cannot be excused from neglect of duty for the reason that his co-executor had taken the burden of the trust upon himself. It is the duty of an executor to protect the funds of the estate. Should he not interfere with the collection of assets by his associate he does not become liable by the waste and negligence of the latter; but where he has knowledge of the doings and shortcomings of his associate, his liability for the loss is fixed.

The measure of his liability is established by the degree of carelessness or omission of duty. The intent of the executor is as a guide in arriving at his liability for loss that occurs to the estate. (103 New York, 329.)

2. Executors are obliged to perform the unfinished contracts of the deceased, whether it be the purchase of real estate or the completion of the sale of personalty. And if any loss is sustained thereby, the executors acting in good faith and as prudent men, they are exempt and free from liability therefor or even blame.

It is not a safe or a wise course for executors to invest estate funds in mortgages upon real estate situated in a different state from that in which they received their letters of authority. In the event of a loss occurring they would be liable for the same unless there was a cogent reason or urgency why the investment should have been made in such other or foreign state. (103 New York, 607.)

3. Executors, who, by the will, are authorized to carry on the business from the time of the death of the testator until, in their judgment, the business is no longer a paying one, and who are also authorized to pay for repairs to the property of the business, are entitled to deduct these expenses from the income or net profits of the business so carried on by them as the trustees of the deceased.

Under a will the executors were to pay the "residue and net proceeds" to certain persons named therein, during their lives. The executors in settling their accounts charged for purchases made, bad book accounts, repairs, etc., and deducted them from the shares of these certain persons entitled thereto. The language of the will was general in turning the business over to the executors, vesting them with discretionary power. (103 New York, 626.)

FARM LAW.

Away-Going Crops.—Things Partaking of the Nature of Realty.—Requisites of Sale.—Sale of growing grass and standing timber is a sale of an interest in land, and a contract of that character, to be binding, must be witnessed by a memorandum in writing.

It is a question, however, whether clover belongs in the same category with other grasses in this respect, not being of a perennial growth.

One A., in 1830, was the holder of a lease measured by three

lives in being. The last of the three lives came to an end in July, terminating the lease. In May previous A. had sowed a field with barley, seeding at the same time with clover. In the autumn he reaped the barley, taking off at the same time some of the clover-tops. The clover was not fit for hay until the following year. In January the property was surrendered to B., who was next entitled, after the expiration of A's lease. B. cut the clover about the end of May, and a second crop in the fall. A. contended that he was entitled to the spring crop, because it was growing when his lease expired. The Court, however, held substantially that he was limited to the year in which the seed was sown. (*Graves v. Weld*, 5 B. & Ad., 105.)

Sale.—Reaping Machine.—Delivery in Parts.—No Complete Delivery until Set up.—The Wood Mowing Machine Company made a contract with G., about the 10th of July, to sell him a reaping machine, which the agent promised should be delivered ready for use on or before the 15th of that month. On the 14th the boxes containing the parts arrived at the station, and G. drew them home on the forenoon of that day. The agent told G. that he expected an expert to set it up, and the next day, which was Saturday, G. went to the station for him. He did not arrive, and again on Monday, the 16th, G. went for him, with the same result. He then told the agent that he did not want the machine, because his wheat was dead ripe, and he must hire men and cut it right away. This he proceeded to do. On the 18th the expert went to G.'s to set up the machine, but G., having already cut most of his wheat, refused to take it. The trial judge charged the jury as follows: "I say to the jury, if you find the machine was delivered there on or before the 15th, then the company were to have a reasonable length of time after Mr. Gaertner had drawn the machine home in which to set it up, and give him an opportunity to test it, and that by Wednesday was a reasonable time, within the law; and that if you find from the evidence that Mr. Gaertner said, 'I will not take it,' as early as Monday, which was the next day after the time fixed for its delivery, and repeated it on Tuesday, and then on Wednesday, 'I will not hitch on to it, and I am not going to take it,'

then the company need not set it up, nor test it, nor give him any opportunity to examine it at all, and he became liable for the machine at the contract price."

On appeal the Supreme Court said—"This was practically directing a verdict for plaintiff, and was an error. The machine could not be considered as delivered until it was set up as a machine. The different parts, which none but an expert could put together and form into a machine, could not be called a machine, as required by the contract, until attached together, and forming a complete harvester. Under all the circumstances, it would seem that both parties contemplated that the machine should be delivered in a condition fit for use on or before July 15th. Certain it is, that the whole tenor of defendant's testimony was to that effect, and he had a right to go to the jury upon that theory. If the jury so found the question of reasonable time would be out of the case entirely."

The judgment below in favor of the Wood Company was accordingly reversed, and a new trial granted. (Wood Mowing Machine Co. v. Gaertner, 30 North-Western Reporter, 106; Michigan Sup. Ct., Nov. 4, 1886.)

Laborer Quitting Employment.—Damages.—R. hired by the month to B., and in defending a suit for wages, B. claimed that R. left during the haying season, before the end of the period for which he was hired. He also offered to prove that when R. left his service he had a large quantity of hay in the shock, and a quantity uncut in the field, that he was not able to get other help, and that it was lost in consequence. He also offered to prove the value of the hay. The district court excluded this evidence on the ground that it did not afford the measure of damages for the breach of contract. The Supreme Court took the same view, and said—"The damages sustained by defendant in the loss of the hay are too remote to be recovered in an action for a violation of the contract. It can not be said that the injury complained of is the natural and proximate consequence of plaintiff's breach of contract." (Riech v. Bolch, 68 Iowa, 526.)

Ownership of Ice on Navigable Streams.—Riparian Owners no Title.—W. and others were the lessees of premises on the banks of the Kansas river, and made a business of gathering ice, claiming to the centre of the river. F. and others undertook to gather ice off the shore in question, and the Kansas Supreme Court was asked to issue an injunction restraining them. The Court, saying that the Kansas was a navigable river, held that owners of the land along its banks had no title to the soil underneath the water, and therefore none to the ice, which was held to belong to the general public, or the State. (Wood v. Fowler, 1882.)

Ice.—Ownership On Non-Tidal Streams.—Shortall owned land on both banks of the Calumet river, and the Washington Ice Company, owning land adjoining, cut and gathered the ice in front of their own land, and then proceeded to cut and gather opposite Shortall's. The latter sued them for trespass. The Supreme Court, conceding that the Calumet was navigable in fact, said that by the common law only arms of the sea, and streams where the tide ebbs and flows, are regarded as such, and with regard to all others the law of that State, following the common law, extended the title of the riparian owner to the middle of the stream. Where the same owner held both banks he owns the whole river to the extent of the length of his lands upon it, and the Court accordingly adjudged that Shortall was the owner of the ice. The Court said—"The exclusive right in the owner to take the ice formed over his land is an analogous right to those other ones which are acknowledged to exist in the subjects which have been mentioned, and may with like propriety be recognized. It is connected with and in the nature of an accession to the land, being an increment arising from formation over it, and belonging to the land properly, as being included in it, in its indefinite extent upward." (Washington Ice Company v. Shortall, 101 Illinois.)

Public Ownership of Ice on Great Ponds.—R., a milk dealer, had an ice-house on the bank of a large pond, of about 180 acres in extent, and had cleared away the snow on a large area of it, preparatory to cutting and harvesting the ice. D.,

for the purpose of fishing through the ice, cut several holes about a foot in diameter in the cleared area, and was sued by R. for trespass.

In the Supreme Court the rights of the parties were thus defined by Chief Justice Gray: "The right of fishing, as well as the right of taking ice, in a great pond, is a public right, which every inhabitant who can obtain access to the pond without trespass may exercise, so long as he does not interfere with the reasonable exercise by others of these and like rights in the pond, and complies with any rules established by the legislature, or under its authority. * * * * The plaintiffs had no peculiar title or right in the pond by virtue of being lessees of an ice-house and land upon the shore." (Rowell v. Doyle, Mass. Sup. Ct., October, 1881.)

Running Waters, Ponds, etc.—Use of Mill Streams.—Injury by Backwater or Pollution.—Loss of Profits Recoverable.—1. G. & K. were owners of a mill-dam and mill on S. river, and F. & O. were owners of a similar dam and mill on the same stream about six miles below. The former brought an action to recover damages produced by backwater from F. & O.'s dam, and also for an abatement of the dam. A judgment for damages and the removal of a portion of the dam was given in the lower court. Evidence was introduced, under objection, tending to show the profits, or how much G. & K.'s mill would have earned if the dam had not caused the water to flow back on the water-wheel and impede the operation of the machinery. On appeal to the Supreme Court the opinion was expressed that however inadmissible such evidence might be in an action on contract, it was competent evidence in the case of a tort or wrong, for the purpose of enabling the court to determine the amount of the damages. The judgment was accordingly affirmed. (Gibson & Kloppenstein v. Fischer & Orton, 68 Iowa, 29.)

2. A. was the owner of a lumber and clothes-pin mill situated on a small stream, and below them C. owned and operated another mill. C. complained that sawdust from A.'s mill floated down and filled up his pond; that some of it also was deposited on C.'s meadow land. C. also complained that A.

had diverted the water of one of the branches composing the mill stream, kept it ponded or stored up, and discharged it in an unreasonable manner, depriving C. of its beneficial use. The diversion and storing up of the water was admitted, and claimed as A.'s right; but it is shown that the diverted water is returned to its natural channel before entering C.'s land, and is not materially diminished in quantity. It was also proved that the sawdust deposited on C.'s meadows was in part from A.'s and in part from C.'s own mill, and the Supreme Court held the damage from this latter cause to be so inconsiderable that they would not undertake to separate and estimate its amount. They also held that A. had the right to the use of the water, and to detain it as long as might be necessary to the proper enjoyment of the right. But the discharge of A.'s sawdust into the stream, or its deposit on the banks in such a way that it found its way into the stream in quantities injurious to C., the Court declared to be illegal, and ordered its further deposit in that manner to be restrained by a perpetual injunction. (*Canfield v. Arthur*, 54 Vermont.)

Wood and Timber Cut and Removed from Mortgaged Land.

—Mortgagee's Right to Follow and Recover it or its Value.—

One Warner, the owner of a mortgaged wood-lot, after a breach of the conditions of the mortgage, but before the mortgagee had taken possession, cut and sold a quantity of wood and timber therefrom. The mortgagee brought suit against the purchaser, for a wrongful conversion, and gained a verdict. It was set aside, and a new trial ordered by the Massachusetts Supreme Court, because the jury did not pass upon the question whether the mortgagee's consent might not have been presumed from the circumstances. As to the mortgagee's rights generally, in such a case, however, the Court said:

“Upon the question whether if a mortgagor commits waste by removing buildings, wood, timber, fixtures or other parts of the realty, the mortgagee out of possession can follow the property after it has been severed and recover it or its value, there have been conflicting decisions in different jurisdictions.

In New York and Connecticut it has been held that a mortgagee out of possession cannot maintain an action at law for waste committed by the mortgagor, and that he has no property in wood or timber cut and removed, so as to enable him to maintain trover for its possession. On the other hand, it has been held in Maine, New Hampshire, Vermont and Rhode Island, that timber, if wrongfully cut and removed by the mortgagor, remains the property of the mortgagee out of possession, and he may recover its value of the mortgagor or a purchaser from him. * * * Under our law a mortgagee is so far the owner in fee of the mortgaged estate, that if any part of it is wrongfully severed and converted into personalty by the mortgagor, his interest is not divested, but he remains the owner of the personalty and may follow and recover it or its value of any one who has converted it to his own use." (*Searle v. Sawyer*, (1879,) 8 North-East Reporter, 820.)

FRAUD AND FALSE REPRESENTATIONS.

One Crowley was a depositor in the Mechanics and Laborers Savings Bank of Jersey City. He heard rumors affecting the condition of the bank, and went to Smyth, one of the directors, and a member of the finance committee, mentioned the rumor, and saying that he was a depositor and did not want to lose his money, suggested that he should draw his money out. Smyth replied, "It can't be so, unknown to me and Mr. Monks. We are on the finance committee. There can be nothing wrong with that bank unknown to me and Mr. Monks. Don't believe any of these false reports; believe me, take my word for it. The bank is good, paying six per cent—the best in the state. If all that is in Jersey tells you the bank is bad, don't believe it till I tell you." He also said, "there was a surplus of over \$6,000 after the dividends were paid." This was about the first of August, and the bank was actually insolvent at that time, but it continued payment until the first of November following, when it went into the hands of a receiver. There was no evidence that Smyth knew the condition of the bank, but it appeared on the other hand

that he was present at a meeting of directors when the president read his statement, showing a surplus of \$6,000, and a dividend of six per cent was declared, and at several subsequent meetings when semi-annual dividends were voted upon the statements submitted.

It was contended that even if Smyth did not know his statements to be false, and did not really know the condition of the bank, yet his assertions having been made with the pretension to knowledge, and Crowley having suffered injury thereby, he was liable in damages for the false representation. The Supreme Court would not go to this length, and said that "it should have been left to the jury to say whether, upon the evidence, Smyth made the representations with a fraudulent purpose to deceive, or whether he made them in good faith and in the honest belief that they were true," the implication being that in the latter case he would not be liable in damages. (*Crowley v. Smyth*, N. J. Sup. Ct., 1884.)

Evidence of Fraudulent Misrepresentation.—Clear Preponderance Necessary to Rescind Contract.—J. M. K. sold to D. twenty-five shares of stock in the Hawkeye Seed Company, the consideration being the conveyance of certain real estate to H. M. K. Misrepresentation of the business of the company was alleged as a ground for setting aside the deed and rescinding the sale. D. claimed that J. M. K. represented to him that the company was on a secure footing, and that there were no debts but what the outstanding accounts would balance. J. M. K. testified—"I did not say that the credits due the corporation would about liquidate the outstanding indebtedness. I said they might come in the neighborhood of balancing; I could not say. I said this was simply a guess. He said 'guess at it,' and insisted upon a guess; and that was my guess. That was my impression at the time I made the statement." With respect to the facts thus alleged, the Court said—"Neither the plaintiff nor Knox are materially corroborated, and so far as we can see they are equally entitled to credit. There is nothing in the story told by either which will warrant us in disbelieving either of them. All that can be said is, that they have understood the trans-

action differently. But," the Court said, "it must be true, we think, that before a contract can be rescinded the evidence must be clear, satisfactory and preponderate in favor of the party asking the rescission. Possibly the rule is that a mere preponderance is not sufficient, but the preponderance must be made to clearly appear. It is also true that if no artifice be used to prevent the party asserting the fraud from making the requisite examination to ascertain the truth, and he has the opportunity to do so, and there was no special confidence between the parties reposed by the one in the other, the contract will not be rescinded. (*Dirkson v. Knox*, 30 North-Western Reporter, 49; Iowa Sup. Ct., Oct. 23, 1886.)

Release Obtained by Misapprehension of Object.—When Consideration Need not be Returned in Order to Avoid the Contract.

—One Mullen was injured by a collision on the Old Colony Railroad, and having sued them for damages, was met with the defense that he had released them from their liability, in consideration of a payment of \$450. A paper to that effect, attested by his mark, was offered in evidence. Mullen testified that he received the money as a gratuity, or provision for his support during the pendency of the trial, and, not being able to read, did not know that he was signing a release of his cause of action. In the trial court a verdict was ordered against him, because he had not first returned the money; the principle being, as stated by the appellate court, that "if a party enters into a contract and in consideration of so doing receives money or merchandise, and afterwards seeks to avoid the effect of such contract, as having been fraudulently obtained, he must first give back to the other party the consideration received." A new trial was however ordered, because, said the Massachusetts Supreme Judicial Court, "the principle applies to those cases only where that which was received, and which must be returned, was the consideration of the contract or settlement which the receiver intended to make, and understood that he was making. It does not apply to cases where a party holds out that he gives the consideration for one thing, and by fraud obtains an agreement that it was given for another thing. In the case at bar, if the

evidence for the plaintiff was true, he signed the paper which purports to show a settlement of his claim, believing it to be a totally different paper from what it in fact was. Signing in that belief, in consequence of the fraudulent representations of the defendant, he is not bound by it, because he never made the agreement which the paper indicates. If this fact is established, it establishes the further fact, that he did not receive the money which was paid him when the paper was signed, in consideration of the settlement of his claim. The answer of the defendant, which sets up a release and discharge of the plaintiff's claim, in consideration of \$450, is fully met by the plaintiff's evidence, if true. If it was paid for the support of the plaintiff till his case should be tried, or for a year as a gratuity, it is clear that the defendant cannot insist on repayment. If it was paid with a representation that it was a gratuity, though with an intention on the part of the defendant's agents, to get the plaintiff's signature to the paper relied on in defense, in consequence of such payment, the payment was a part of the fraudulent scheme, and the defendant cannot obtain any advantage from its own fraud." (Mullen v. Old Colony Railroad Company, 8 New England Reporter, 363.)

GIFTS.

Gift Made in Expectation of Death.—Bonds and Mortgages Pass by Delivery Without Assignment.—But Such a Gift May be Set Aside for the Benefit of Creditors.—A man in his last illness, while despairing of all hope of recovery, and on the third day previous to his death, handed several notes, bonds and mortgages to W., in the presence of several witnesses, and said that he gave them to him to take and collect them, and that he might have the money in case he died. After the donor's death, his administrator sued W. to recover the securities, contending that the title to bonds, bills of exchange and promissory notes, could only be passed by indorsement or assignment, and could not be transferred by mere delivery as a gift *causa mortis*. On this point the Supreme Court did not sustain the administrator's claim, but after citing the

English case of *Baily v. Snellgrove*, 3 Atk., 214, went on to say:

“This is undoubtedly an authority for the doctrine, that a bond without indorsement is the subject of a *donatio causa mortis* in equity. And the principle is fully sustained by the authorities. When this principle was first applied to the transfer of personal property, it was limited to chattels which might be delivered by the hand. But as trade and commerce advanced, it was gradually relaxed, and was extended, first to embrace bank notes, then lottery tickets and securities indorsed in blank, and finally to bonds. *Snellgrove v. Baily* was the first case, we believe, in which the doctrine was extended to bonds. There the donor had delivered a bond to the donee, saying, ‘In case I die it is yours, and then you have something.’”

It was also contended that the gift must be established by clear and unmistakable proof, but the Court replied, “The law raised the presumption from the fact of possession, and the onus was upon the plaintiff to rebut it.” But the Court also said that “upon a deficiency of assets to pay the lawful claims of creditors, any gift *causa mortis* must give way, so far as may be necessary to discharge lawful demands.” It appearing that the estate was insolvent, judgment was given that the administrator had the right to recover the securities, and to apply them as far as might be necessary to the decedent’s debts, any remainder being repaid to the donee, *W. (Kiff v. Weaver, 94 North Carolina, 274.)*

“*Donatio Causa Mortis*,” (*Gift in Anticipation of Immediate Death*).—1. A gift *causa mortis* is one made by the delivery of personal property by the donor in his last sickness, and in expectation of death, then imminent, and upon condition that it shall belong to donee, if the donor dies, as anticipated, without revoking the gift, leaving the donee surviving him, and not otherwise. (*Henschel v. Warner, (Wis.,) North-Western Reporter, 926.*)

2. To constitute a valid gift *causa mortis* actual delivery by the donor in his life-time is necessary, or if the nature of the property is such that it is not susceptible of corporeal delivery, the means of obtaining possession of it must be

delivered. (Emery v. Clough, (N. H.,) 4 Atl. Rep., 796; Gano v. Fisk, (Ohio,) 3 N. E. Rep., 532; Vandor v. Roach, (Cal.,) 15 Pac. Rep., 354; Parcher v. Savings Bank, (Maine,) 7 Atl. Rep., 266.)

3. Testator gave to the draughtsman of his will, afterwards his executor, a note made by his son, to be given to the latter if he did not contest the will; if he contested the will the note was to be given to the widow. Testator never again resumed possession of the note, though his wife put the note in his pocket-book. Held, that this was a complete and valid gift *causa mortis* to the son. (Woodburn v. Woodburn, (Ill.,) 14 North-East Reporter, 58.)

4. A deposited money in a savings bank in his own name, "payable also to B. in case of death of A." Held, that this did not constitute a valid *donatio causa mortis*, it not appearing that the alleged gift was made during the illness or peril of the donor, and in contemplation and expectation of death which resulted therefrom. (Parcher v. Savings Banks, (Maine,) 7 Atl. Rep., 266.)

5. Where one a few days before his death delivered to another his bank-book, requesting him to keep it for his daughter, and on his death deliver it to her, but does not part with the present dominion or control of the book, or the money represented thereby, there is no *donatio causa mortis*. (Daniel v. Smith, (Cal.,) 17 Pacific Reporter, 683.)

6. The instrument or document must be delivered to the donee, so as to vest him with an equitable title to the fund it represents, and to divest the donor of all present control and dominion over it; and a delivery which does not confer upon the donee the present right to reduce the fund into possession by enforcing the obligation according to its terms will not suffice. (Opinion of Court per Mathews, J., in *Basket v. Hassell*, 107, United States, 602.)

7. A certificate of deposit may be the subject of gift *causa mortis*, and if delivered by the donor during her last illness, in anticipation of death, to a third person, for the use of the donee, the title passes upon her death, though the certificate is payable to the donor's order, and has not been indorsed by her. (Connor v. Root, (Colo.,) 17 Pacific Reporter, 773.)

8. A memorandum disposed of certain personal property to different individuals, made by a testatrix after making her will, was called for by her on her death-bed, and delivered to her sister, with the request that it be carried out as her will. Most of the donees, as well as of the articles mentioned, were not present at the time. Held, not to be gifts *causa mortis*. (Trenholm v. Morgan, (S. C.,) 5 South-Eastern Reporter, 721; see also Manikee v. Beard, (Ky.,) 2 S. W. Rep., 545.)

“*Inter Vivos*,” (*Between the Living*).—1. To establish a parol gift or sale of land between parent and child, the evidence must be direct, positive, express and unambiguous; the terms of the sale or gift must be clearly defined, and all the acts necessary to its validity must have special reference to it, and to nothing else. (Erie & Wyoming Valley Railroad Company v. Knowles, (Pa.,) 11 Atl. Reporter, 250.)

2. A gift of personal property from father to son, to be valid, must be accompanied by delivery, and the delivery must be actual, so far as the subject of the gift in its nature is capable of delivery. (Medlock v. Powell, (N. C.,) 2 South-Eastern Reporter, 149.)

3. Where a father gave his daughter, residing with him, and who continued to reside with him as long as he lived, a colt, of which she had possession only at their residence, which she eight or nine years afterwards exchanged for a mare, which she kept on her father's farm as long as he lived, such mare is the property of the daughter. (Lowther v. Lowther, (W. Va.,) 3 S. E. Rep., 42; Snowden v. Reid, (Md.,) 10 Atl. Rep., 175; Space's Exrs. v. Guest, (N. J.,) 10 Atl. Rep., 152; Smith v. Ossippee Valley and C. Bank, (N. H.,) 9 Atl. Rep., 792; Marston v. Marston, (N. H.,) 5 Atl. Rep., 713; Flanders v. Blandy, (Ohio,) 12 N. E. Rep., 321; Scott v. Ford, (Mass.,) 2 N. E. Rep., 925; Love v. Francis, (Mich.,) 29 N. W. Rep., 844.)

Delivery.—1. Any act which indicates a renunciation of dominion by the donor, and transfer of dominion to the donee, is sufficient delivery under Code of Georgia, § 2660, relating to gifts, and at common law. (Poullain v. Poullain, (Ga.,) 4 South-Eastern Reporter, 81.)

2. In an action by an administrator for the possession of property claimed by defendant under a parol gift from decedent, where the gift is fully proved, subsequent declarations of the donor tending to controvert the gift will be excluded. (Bennett v. Cook, (S. C.,) 6 South-Eastern Reporter, 28.) It appeared that the intestate some time before his death said, "All I've got I have carried to Joe Cook's, and there is where I expect to stay until I die. And this horse I have given to Joe Cook, on condition that when I want to ride he is my horse, and, when I have no use for the horse, it's Joe Cook's and all that I have." Held, that the reservation of the right to use was a condition subsequent, and did not invalidate the gift, though made by parol. (Poullain v. Poullain, (Ga.,) 4 South-Eastern Reporter, 81.)

Property not in Existence.—A husband agreed to give the crop to be planted and grown on land that was the statutory separate estate of his wife, to his wife and minor son in consideration of their working and raising such crop, he agreeing to furnish a horse to make it with. Subsequently he executed a mortgage on the property to secure advances, and still later the wife and son executed another mortgage. Held, that the gift to the wife and son did not effect, as there was no crop in existence at the time capable of delivery to the donees; that the contract was merely executory, and liable to be revoked; that the execution of the mortgage by the husband was a revocation; and that the mortgage by the wife and son was void. (Bayett v. Potter, (Ala.,) 2 S. Rep., 534.)

GUARANTY AND SURETYSHIP.

Written Guaranty on Oral Condition Precedent.—Signer not Bound Unless Condition is Fulfilled.—The question of liability on an unconditional written contract of guaranty, accompanied by an oral condition precedent, arose on the following instrument:

\$10,000.

OFFICE OF BELLEVILLE NAIL MILL Co., }
BELLEVILLE, Ill., July 17, 1874. }

Four months after date pay to the order of Belleville Savings Bank ten thousand dollars, value received, and charge same to account of Belleville Nail Mill Co.

CONRAD BORNMAN, Pres't.

To F. H. PIEPER, Treas. Belleville, Ill.

JAS. C. WAUGH, Secy.

Written across the face of the instrument were the words "Accepted, F. H. Pieper, Treas." On the back were the signatures of Conrad Bornman and James Waugh. On the trial of a suit against the estate of Bornman as guarantor of this obligation it was proven that after it was executed by the Belleville Nail Mill Company, Bornman wrote his name on the back of it and gave it to F. H. Pieper, directing him to tell the cashier of the bank that the draft was not to be taken unless Mr. Abend placed his name on the back of it. The cashier was so notified. Abend never indorsed the draft, but he executed a separate paper guarantying its payment if it was not paid by the Belleville Nail Mill Company or Conrad Bornman. The Illinois Supreme Court said:

"This contract was a conditional one; he (Bornman) guaranteed the draft on the condition that Abend should also become a guarantor like himself by writing his name on the back of the draft, and the bank before accepting the draft had notice of that fact. As the condition on which Bornman agreed to become bound as a guarantor of the paper was never performed, of which the bank had notice before accepting the draft, he incurred no obligation. The bank had no right to take the draft until Abend had written his name on the back of it. It was, as between the bank and Bornman, an incomplete instrument until that condition was complied with, and, so far as the conditional contract of Bornman is concerned, no recovery can be had upon it." (Belleville Savings Bank v. Bornman, 8 Western Reporter, 366.)

Cancellation of Guaranty on Execution of Renewal.—The Renewal Being Void the Old Contract Remains in Force.—In the previous case the draft there reproduced was given in renewal of one similar in all respects except date and indorsement. On the back were the signatures of Conrad Bornman, James Waugh, and Edward Abend, as co-guarantors. The first draft, when the other was taken to the bank, was marked paid and surrendered. It was, however, contended by the bank that if Bornman was not liable as guarantor on the second draft, by reason of the lack of Abend's signature, then his liability on the first draft remained undis-

charged, and might be enforced against his estate. The Illinois Supreme Court adopted this view, and said:

“That draft has never been paid, and Bornman’s liability to pay it has not been discharged. As respects Bornman, all that he has done in the way of discharging this undoubted liability of his, is, that he has made an abortive attempt toward the continuation and extension of his liability for four months. In place of his guaranty of the draft of March 4, he was willing to become a guarantor with Abend on a draft in renewal, payable at the end of four months, upon the condition that before it was delivered Abend should likewise place his name on the draft as co-guarantor. This Abend did not do; consequently Bornman’s placing his name on the renewal draft went for nought, and it was as if he had never done so. So Bornman’s liability on the draft of March 4, 1878, remains with nothing whatever done on his part in discharge of it.”

Delay in Realizing Money on Check.—Discharge of Surety on Debt Thereby Left Unpaid.—It is not safe to hold a check as if it were a promissory note. Among the other consequences which may happen from such a course, is the loss of the debt for which the check was given, by the discharge of a surety. This occurred under the following circumstances: Rose, treasurer of the Girard Lodge, by direction, sent on May 27th to the Grand Lodge his personal check for \$920, due by the subordinate to the superior body, and payment was receipted for. On the 28th there was money to meet the check, but it was presented until the 4th of June, and on the morning of that day a note of Rose’s came due at the bank, and the funds to his credit were appropriated to its payment, leaving the bank without the means to honor the check. Under compulsion of the Grand Lodge, the Girard Lodge took up the check, and sued McDonald, surety on Rose’s official bond to enforce reimbursement. The Supreme Court held the bank to be right in appropriating the funds at Rose’s credit to the note due there, and also held that McDonald was released from liability on Rose’s bond, by the delay in collecting the check. The Court said:

“A check is generally designed for immediate payment, and not for circulation. It is the duty of the holder to present it for payment as soon as he reasonably may, and if he does not he keeps it at his own risk. The Girard Lodge accepted it as a payment from Rose. In like manner the Grand Lodge accepted it from the subordinate lodge. In order to charge the surety by reason of the non-payment, it should have been presented for payment within a reasonable time. Had it been so presented it would have been paid. A delay of seven days was an unreasonable time.” (Fegley v. McDonald, Pennsylvania Sup. Ct., May 5, 1879.)

Joint Maker in Form Shown to be Only Surety.—Discharge of Surety by Extension to Principal Debtor.—C. S. and John H. Oaks made a joint and several note to William H. Stevens, for money lent to the former. Stevens understood that John H. was to be held as surety only, though he signed as one of the principals. For a consideration from C. S. Oaks he extended the time of payment, and the Supreme Court held that this extension discharged John H. Oaks from liability to pay, saying—“The form of the obligation does not prevent a showing that one of the parties was a surety. He was bound by the obligation in the form which he adopted. But it is elementary law that a creditor who knows of the fact of suretyship must not violate the rights of the surety.” (Stevens v. Oaks, 58 Mich., 343.)

Guarantor's Right to Notice that His Offer of Guaranty is Accepted.—Formal Notice not Always Necessary.—The following agreement was made and delivered to Lewis & Brother, of Louisville, agents of S. E. Thompson, of New York, in order to enable the shipper to draw on him for the full value of the tobacco:

LOUISVILLE, Ky., May 26, 1876.

MR. S. E. THOMPSON, NEW YORK.

Dear Sir—My brother, T. B. Glover, having this day shipped to you for his account, 23 hhds. of tobacco marked (giving numbers), and in view of his drawing for full cost of same, I hereby agree to secure you against any loss that this shipment may make, and in the event of any loss bind myself to pay it.

Signed. THO. H. GLOVER.

The agreement was forwarded to Thompson, and the shipper at the same time drew on him for \$1,943.22, the draft

being to the order of Tho. H. Glover, indorsed by him, and paid by Thompson at maturity. The tobacco did not realize the amount of the draft by \$854.39, and Thompson sued T. H. Glover on his guaranty, in order to recover the deficiency. The question was whether the guarantor was bound without formal notice that his guaranty was accepted. In the lower court it was held that he was not, but the Kentucky Court of Appeals thought otherwise;

"It is well established," remarked Justice Hines, "that there must be an acceptance of the offer of guaranty, and a notice, express or implied, to the guarantor, of such acceptance. The reason of this rule is, that the guarantor may have an opportunity of arranging his relations with the party for whose benefit or in whose favor the guaranty is given. The rule should not be pressed beyond this reason. When the whole of the transaction is connected, and of such a nature as to give the guarantor this information, no specific or formal notice is necessary. In the case under consideration the agreement to accept made with Lewis & Brother for appellant (Thompson) was contemporaneous with the guaranty, and was the consideration therefor, and all the parties being privy to the whole transaction, no specific notice was necessary. The minds of all the parties met, and the contract was completed at the time of the execution and delivering to Lewis & Brother of the writing by appellee (Glover), and of the drawing of the draft. The only notice that could have been of any benefit to appellee, and to which he was entitled, was a notice of the amount that the tobacco fell short, and the failure of T. B. Glover to pay the same. This notice appellee received within a reasonable time." (Thompson v. Glover, 8 New England Reporter, 589.)

Effect of Oral Promise to Become Surety.—Conflict of Authorities.—A. asked B. to become surety for his (A.'s) son, on a note to W., promising orally to see the note paid. Default having been made, A. refused to fulfill his promise, standing upon the provision of the statute of frauds, that no action shall be brought to charge any person upon a special promise to answer for the debt, default or miscarriage of another

unless the same is in writing. The Supreme Court, while admitting that the American and English decisions are hopelessly in conflict on the question, held that the promise was binding though not in writing. (*Demilt v. Bickford*, 58 New Hampshire.) The decision agrees with cases in New York, Wisconsin, Connecticut, Massachusetts, and other states, but is opposed by Ohio authority. (*Easter v. White*, 12 Ohio State, 219.)

HIGHWAYS AND STREETS.

Time Necessary to Complete Dedication of Land as Highway.

—J. M. Proctor, the owner of land along a highway in Missouri, left a strip of his land, which was used ten years, with his acquiescence, as a part of the road. He then attempted to enclose it and secure his right of ownership, but was indicted and fined \$20 for obstructing the highway. On appeal to the Supreme Court, the judgment was affirmed, and it was said in the opinion:

“The Court, by its instructions given on behalf of the State, tried the case on the theory that if the owner of a tract of land, in fencing it up leave a strip of land for the purpose of a public road, and that said strip so left had for more than ten years been continuously claimed, used, traveled, worked, and repaired as a public road, with the knowledge and acquiescence of the owner and occupant of said land, then such road was a public road, for the willful obstruction of which the obstructor could be proceeded against by indictment. The Court was fully warranted in giving instructions embracing this theory of the case.” (*State of Missouri v. Proctor*, 7 Western Reporter, 135.)

Unusual Objects on the Highway.—Liability of Municipalities from Resulting Injuries.—Mary Adams sued the town of Rushville, Ind., from injuries caused by her horse running away, in consequence of fright in seeing a vessel suspended on a tripod over a fire, a candy manufacturer thus being engaged in prosecuting his business on the public street. The Indiana Supreme Court affirmed a judgment against the town for damages, saying that it is the duty of “such corporations

to keep their streets in a safe condition, and free from all obstructions that may seriously interfere with travel, and thus result in injury to travelers. This duty relates not only to defects in the roadway, and objects thereon, against which vehicles may be wrecked, but also extends the liability to injuries from falling awnings, ice and snow, and to injuries resulting from the fright of horses of ordinary gentleness at objects upon the streets naturally calculated, and which may be reasonably be expected, to produce such fright. It cannot be said, with reason, that streets in which such obstructions are suffered to be placed and remain, which by their appearance are calculated to frighten such horses, are in a reasonably safe condition." (Town of Rushville, appellant, v. Mary Adams, 5 Western Reporter, 682.)

The Right of Way.—When a Railroad Company May Take Possession of a Public Road.—When a body corporate commands or directs an act to be done, and it is done to the nuisance of the community at large, there is no principle which places it beyond the reach of the criminal law. An indictment will lie, at the common law, against a corporation for not repairing a road, a bridge, or a wharf, when by statute or prescription it is bound to do so. (Whar. Crim. Law, (7th ed.,) 86.) If it were not so, there would be no effectual means for deterring railway and other corporations from an oppressive exercise of power in this respect. A railway corporation may take possession of such portion of any public road as may be within the limits of the right of way; it is not liable to indictment for nuisance for the mere taking and occupancy of the road. (Danville, etc., Railroad Company v. Commonwealth, 73 Pa., 29.) In Northern Central Railway Company v. Commonwealth, 90 Pa., 300, it was held, however, that, although the company may construct its railway across any established road, whenever it is necessary to cross or intersect it, the railway must be so constructed that it will not impede the passage or transportation of persons or property along the road; if it is not, but, on the contrary, is so constructed as to be a dangerous obstruction to travel along the road, the company may be indicted therefor.

The Act of 3d of April, 1837, which constituted the charter of the Sunbury & Erie Railroad Company, (now the Philadelphia & Erie Railroad,) in the 14th section, expressly provides that the said railroad shall be so constructed as not to impede or obstruct the free use and passage of any public road or roads which may cross or enter the same, etc. By a supplement passed in the year 1852, it was provided, "That, if said railroad company shall find it necessary to change the site of any turnpike or public road, they shall cause the same to be reconstructed forthwith, at their own proper expense, on the most favorable location, and in as perfect a manner as the original road." The provision last quoted is similar in all respects to the 13th section of the Act of 14th of February, 1849, and it has been held that an indictment will lie against a railroad company for failure to reconstruct the road within a reasonable time, in accordance with the requirements of this section of the Act of 1849. (*Pittsburg, etc., Railroad Company v. Commonwealth*, 101 Pa., 192.) "The injury," says the Court in the case cited, "is not to an individual only, but to the public; it is the denial to every citizen of the commonwealth of a right to the use of a public highway in place of the one taken by the corporation. * * *

The Act provides no specific remedy for the enforcement of this duty. All common law remedies are therefore open against the violators of this law. The failure to reconstruct concerns the public; it is, therefore, an injury to the commonwealth, to which belongs the franchise of every highway as trustee for the public. (*O'Connor v. Pittsburg*, 6 Harris, 187.)

In the case we are now considering the road was situated between the railroad and the river. It is admitted that the company appropriated a considerable portion of the road, not by crossing it or by passing along it at grade, but by constructing upon it a retaining wall of stone and a high embankment, upon which the railroad bed is built. It was such an appropriation as was wholly inconsistent with the use of the same ground for a public road. It was the duty of the company, therefore, at their own proper expense, forthwith to change the site, and to reconstruct the road on the

most favorable location, in as perfect a manner as the original road for the public. No new road has ever been constructed, and it is alleged that the public has ever since been obliged to pass, at great inconvenience and with much danger, upon a narrow shelf between the wall and the river.

Now, the Philadelphia & Erie Railroad Company, if they were operating their road, would without doubt be responsible criminally for the failure to comply with the requirements of its charter. This is settled by the case we have referred to, *Pittsburg, etc., Railroad v. Commonwealth, supra*. "In accepting the charter," as Mr. Justice Mercur says in the case just cited, "the corporation acquires all the rights and privileges thereby given, but it assumes all the duties and obligations thereby imposed. Having taken the benefits, it cannot repudiate the burdens; it cannot be tolerated that the corporation may claim to enjoy every thing beneficial to itself, and wholly omit to perform an act in which the public is so largely interested. The rights granted are in consideration of duties assumed, among which is the duty of reconstructing the public highway, from which it has excluded the public. Having accepted all the provisions of the Act, this duty arises not only from the imperative command thereof, but also from all implied agreement and by tenure." But the contention is, that the defendants are mere lessees of the railroad; that this public duty did not legally devolve upon them as lessees, and that the criminal law will not charge them with the performance of duties which the Philadelphia & Erie Company alone had assumed.

The Pennsylvania Railroad Company became the lessees of this road in the year 1862, before its completion. The lease was of a road "located, in part constructed, and now being constructed, and to be constructed and completed, from its terminus at Sunbury, etc., to its terminus at the harbor of Erie," etc., with all the lands, bridges, depots, station-houses, machine-shops, etc., embracing the entire property and estate of the company, for a period of 999 years, etc., with the right to use, exercise, and enjoy all the rights, powers and authority, etc., and all the corporate powers and privileges, etc., of the Philadelphia & Erie Railroad Company, as fully and amply

as the same might be used, exercised and enjoyed by the lessors had the lease not been made. These rights and franchises in the hands of the lessees were of the same public character as if they had remained in the hands of the lessors; they were public rights to be exercised by the Philadelphia & Erie Railroad Company in conjunction with the performance of certain public duties, which, by the acceptance of the charter and the construction of the road under it, were assumed. It is from the exercise of these public privileges and franchises, granted by the charter, that the public duty arises. Moreover, the commonwealth not only granted the charter to the Philadelphia & Erie Company, it also authorized the transfer by the lease of the powers and privileges it secured to the Pennsylvania Railroad Company, and the latter company, in accepting the same and in the exercise thereof under the charter of the Philadelphia & Erie Company, must be taken to have assumed all the correspondent duties and obligations resting upon the lessors.

Where a corporation leases the road of another corporation, it becomes subject to all the statutory duties, obligations and restrictions imposed upon the leasing company: (1 Wood on Railroads, 578.) The lessee of a railroad is subject to all the provisions of the lessor's charter, and during the existence of the lease is subject to all the duties and liabilities of the lessor under the charter, except such as may be said to be personal: (*Chicago v. Evans*, 24 Ill., 52.) The Pennsylvania Railroad Company could not exercise these extraordinary powers under their lessor's charter, to the exclusion of all others, even of the Philadelphia & Erie Company itself, without assuming all the correspondent duties imposed by the charter upon the latter company. The State confers upon railway companies some of its most essential powers of sovereignty, and in return stipulates for the faithful performance of such duties by the corporation as are deemed an equivalent or consideration, and neither the terms of their contract, as contained in the charter, nor any sound principle of public policy, will permit another railroad corporation, by a lease or transfer, to enjoy these high privileges and immunities except on the terms imposed.

The Pennsylvania Railroad Company, as the lessee, must accept the subject-matter of the lease *cum onere*. As the duty to reconstruct this public road was a public duty, the disregard and violation of it is a public wrong, and, as we said in *Pittsburg, etc., Railroad Company v. Commonwealth, supra*, this is a proper subject for indictment.

The judgment was therefore reversed, and a *venire facias de novo* awarded by the following opinion of Judge Clark:

“A railway corporation may take possession of such portion of any public road as may be within the limits of the right of way, and may construct its railway across any established road whenever it is necessary to do so; but the railway must be so constructed that it will not impede the passage or transportation of persons or property along the road. It is not, but, on the contrary, is so constructed as to be a dangerous obstruction to travel along the road, the company may be indicted therefor.

“If the corporation finds it necessary to appropriate a public road or any portion of it in such a manner or to such an extent that it is no longer fully available for its original use, a duty arises for the corporation forthwith, at its own expense, to change its site and to reconstruct the road on the most favorable location in as perfect a manner as the original road for the public.

“When a corporation leases the road of another corporation, the lessee company becomes subject to all the statutory duties, obligations and restrictions imposed upon the lessor.” (*Commonwealth of Pennsylvania v. Pennsylvania Railroad Company*, Court of Quarter Sessions of Warren County, January 3, 1888.)

HUSBAND AND WIFE.

Real Estate Held in Name of Husband and Wife.—Survivor Takes Title to the Whole.—Among the points of property law, in connection with the relation of husband and wife, is one familiar to lawyers, but strange to others, known under the legal description of *tenancy by the entirety*. At common law, when land was conveyed to husband and wife they became each entitled to an indivisible part of the whole, and when

one died the survivor took the whole. It was supposed that the married women's acts in New York had abolished this form of estate, but in *Bertter v. Nunan*, 92 New York, 152, the Court of Appeals affirmed its continued existence as a rule of law in that state. In that case N. K. H., in 1868, executed a deed of premises in Buffalo to "C. D. and H. D., his wife, * * * their heirs and assigns." He died leaving her surviving, and on her death the property was sold by her administratrix, who was also her sole heir at law. The purchaser, however, refused to complete the sale, alleging that H. D. had never been seized of more than an undivided half interest, and her administratrix therefore could not convey a clear title. The Court of Appeals decided that she could. Relative to the peculiar nature of the estate by the entirety, the Court said "the survivor took the estate, not by right of survivorship simply, but by virtue of the grant which vested *the entire estate in each grantee*. During the joint lives the husband could, for his own benefit, use, possess and control the land, and take all the profits thereof," (this was at common law,) "and he could mortgage and convey an estate to continue during the joint lives, but he could not make any disposition of the land that would prejudice the right of his wife in case she survived him. This rule is based upon the unity of husband and wife and is very ancient." Referring to the Married Women's Property Acts the Court said—"The claim is made that the legislation referred to has destroyed the common law unity of husband wife, and made them substantially separate persons for all purposes. We are of the opinion that the statutes have not gone so far. * * * Legislation similar to that which exists in this state, as to the rights and property of married women, exists in many of the states of the Union, and the decisions are nearly uniform in all the other states where the question has arisen, that a conveyance to husband and wife has the common law effect, notwithstanding such legislation."

It appears by the citations in the opinion that this conclusion had then (in 1883) been announced by the courts of Pennsylvania, Michigan, Mississippi, New Jersey, Indiana, Wisconsin, Maryland, and Arkansas.

In Iowa the Supreme Court early adopted an opposite rule, and in a case where husband took an estate jointly by a decree in partition, the tenancy was one in common, with no right of survivorship, and that an estate *by the entirety* could only be created by words specially adapted to the purpose. (*Hoffman v. Stigers*, 28 Iowa, 305.)

INSURANCE.

Temporary Breach of Condition Merely Suspends Insurance.

—*Revival on Cessation of the Breach.*—H. was the keeper of a bowling-alley which was insured in the Germania Fire Insurance Company, and was destroyed by fire in August. Between May 1st and the last of June H. had no license, and was then carrying on an illegal business. This illegal occupation ceased in June, over a month before the fire occurred. The Massachusetts Supreme Court under these circumstances reversed a judgment which was directed for the insurance company by the court below, and ordered a new trial. The Court said—"It does not appear that the defendants were or would be in any way injuriously affected after such illegal use had ceased. They have the benefit of the temporary suspension of the risk without any rebate of the premium. There is no hardship to the defendants in requiring them to show an actual injury, or else to avail themselves of the clause of the policy giving them a right to cancel it upon notice and a return of a ratable proportion of the premium. There is no rule of law preventing the revival of a policy of insurance after temporary suspension." (*Hinckley v. Germania Insurance Company*, 1 Eastern Reporter, 73; 32 A. L. J., 110.)

In several other states the same conclusion was reached in analogous cases cited in the above. In Maine the property was alienated, but was reconveyed to the insured, and it was held that the policy was merely suspended during the alienation. (*Lane v. Lane*, 12 Maine, 44.) A similar case was decided in the same way by the Louisiana Supreme Court. (*Power v. Ocean Insurance Company*, 19 Louisiana, 28.) Violation of the condition against other insurance has been held to have only the like temporary effect in Missouri, Pennsylvania and Illinois, and in the latter state an increase of

the risk, which ceased before the loss occurred, was held to involve no graver consequence. (*Insurance Company of North America v. McDonald*, 50 Illinois, 120.)

Several New York cases on insurance were approved by Knapp, J., in *Nelson v. Bound Brook Mutual Fire Insurance Company*, (N. Y., June, 1887, 10 Central Reporter, 220.) He quotes Sheldon on Subrogation, Section 235, where it is said: "If the mortgagee has procured the insurance, though in his own name, at the request and expense and for the benefit of the mortgagor, as well as for his own protection, though this is by a parol agreement unknown to the insurers, the mortgagor will have the right, in case of loss, to have the avails of the policy applied for his relief towards the discharge of his indebtedness," and Judge Knapp adds:

"This statement of the rule is well supported by numerous cases cited by the author. (*Kernochan v. N. Y. Bowery Fire Ins. Co.*, (17 N. Y., 428,) *Hay v. Star Fire Ins. Co.*, (77 N. Y., 236,) and *Clinton v. Hope Ins. Co.*, (45 N. Y., 455,) fully supported the rule as stated in the text."

Life.—Sale of Policy by Husband with Wife's Consent.—An interesting and important branch of the law is that relating to life insurance where the wife and her children are the beneficiaries.

An endowment policy was issued to Mrs. A. upon the life of her husband, payable in case of her death before her husband to her children; she joined with her husband in an assignment of the policy. In an action brought by the assignee or owner of the policy upon the policy wherein Mrs. A. was made the defendant, being substituted as such in place of the insurance company, it was decided by the Court of Appeals the assignment or sale was valid. The fact that Mrs. A. had children at the time of the assignment or sale does not affect its validity, that the children had only a contingent interest, which contingency did not arise, as the policy had matured in the life-time of the mother, (Mrs. A.,) and by the assignment the purchaser (who was the plaintiff in the action,) became vested with the entire interest in the policy.

That Chapter 248, Laws of 1879, of New York, makes policies of insurance issued upon the lives of husbands for the

benefit of their wives "assignable by said wife, with the written consent of her husband." (103 New York, 617.)

Life.—Effect of Warranty.—A celebrated life insurance case came up on appeal, or an important branch of it, and was decided in October, 1886, by the Court of Appeals. The facts of this case are, that one Walton Dwight made and signed an application for insurance in the Germania Life Insurance Company, August 28, 1878, in which he answered certain questions. The policy was delivered to him, containing among others these provisions: "This policy is issued, and the same is accepted by the said assured upon the following express conditions and agreements: That the same shall cease and be null and void and of no effect * * * * if the representations made in the application for this policy, upon the faith of which this contract is made, shall be found in any respect untrue."

The company asked Dwight: A. "For the party whose life is proposed to be assured, state the business carefully specified." Ans. "Real estate and grain dealer." B. "Is this business his own, or does he work for other persons, and in what capacity?" Ans. "His own." C. "In what occupation has he been engaged during the last ten years?" Ans. "Real estate and grain dealer." D. "Is he now, or has he been engaged in or connected with the manufacture or sale of any beer, wine, or other intoxicating liquors?" Ans. "No."

Dwight died November 15, 1878, immediately before the payment of a second quarterly premium became due. Upon the trial it appeared that Dwight was engaged in the business of keeping hotel from May, 1874, until March, 1877, and that during those years he regularly sold wines and liquors in bottles to such of his guests as desired them. He also kept a wine room in which he kept the liquors stored, and had a regular license and permit to sell beer, wine and liquors at retail to be drank upon his premises.

It was proven that Dwight had made answer to other insurance companies that he kept a hotel during three years, and that he sold liquor in packages, so that there was no room for doubt of Dwight having understood the questions of this company answered by him, and that his answers were incorrect.

The motive as well as the propriety of the questions put by this company were clear and understood, to and by Dwight. The language used was free from all and any ambiguity. Dwight's answers at best were evasive. That he was in any other business was not proven by his legal representatives, as the plaintiffs in this action.

Upon many facts contradictory to the statements made by Dwight to this company, the defendant herein, a new trial was ordered, which reversed the judgments of the inferior courts.

Hence, from the opinion of the court, it was held that where, by the terms of a policy of life insurance, the assured warrants the truth of his answers to questions in his application, compliance with the warrants is a condition of the validity of the contract, and any substantial deviation from the truth in an answer, it is to be assumed, is material to the risk and forfeits the policy.

Where, by plain and unambiguous language in such a policy, the observance of an apparently immaterial requirement is made the condition of a valid contract, neither courts nor juries have the right to disregard it.

The construction of a contract depends upon the language of the instrument itself, and it therefore becomes a question of law only, and is for the court to pass upon.

In considering the language of an insurance contract, the words of a promise are to be regarded as those of the promisor, (the company,) while those of a representation, upon which the promise is founded, are the words of the promisee, (the assured,) and, in either case, are to be taken most strongly against the party using them.

It was *held*, that the statement of Dwight, that he was not engaged in any other business than real estate and grain dealer was false, and so was a breach of warranty and forfeited the policy; also, that it conclusively appeared the insured did not misconceive the meaning and intent of the question. (103 New York, 341.)

Life.—Effect of New Policy Issued on Conditions of Old Policy.
—An insurance company issued a policy to the wife of the insured upon his life, containing a clause which provided for

its surrender and the issuing of a new policy therefor. The suit was brought because of this clause upon which a new policy was given.

The original policy contained the following provision: "That if after the receipt by the company of two or more annual premiums, the policy should cease in consequence of the non-payment of premiums, the company, on the surrender of the same, will issue a new policy for the full value acquired under the old one, subject to any notes that may have been received on account of premiums; that is to say, if payments for two years have been made, it will issue a policy for two-tenths of the sum originally insured; if for three years, three-tenths; and in the same proportion for any number of payments, without subjecting the assured to any subsequent charge, except the interest annually on all premium notes remaining unpaid on this policy."

The policy was allowed to lapse after payment of six annual premiums. She surrendered the policy, therefore, to the company, and received a new one for six-tenths of the original amount of insurance; this new policy gave, as the consideration therefor, the surrender of the old one, the representations for the same and the payment of annual interest on the notes which were given for premiums. There was this clause in the second or new policy: "If the interest upon said notes or credits shall not be paid on or before the day or days above mentioned for the payment thereof, * * * then and in every such case the company shall not be liable to pay the sum assured, or any part thereof, and said policy shall cease and be null and void without notice to any party or parties interested therein."

Three annual payments of interest on notes only were made after this new policy was issued. In 1882 the company passed into the hands of a receiver, five years after the last payment of interest. The wife claims that she was ignorant of this forfeiture clause and that it was fraudulently inserted.

It was decided that the assured was bound to pay the premium annually, and if not paid on the day fixed the policy lapsed. The original policy was non-forfeitable only in so far as the company was obliged to issue a new policy for as many tenths as there had been two or more premiums paid up to

time of the omission, upon the surrender of the original policy. If the assured had violated any other condition she would not have been protected against its forfeiture. The new policy provided that it was subject to any notes given on account of premiums. The assured upon receiving the new policy obligated herself to pay the interest on all unpaid premium notes and to bear no other charge. It was not necessary that the first or original policy should provide a forfeiture clause for non-payment of interest, in the new policy, for the successful carrying of the insurance business requires prompt payment upon the part of the policy-holders, and the new policy required the payment of interest on outstanding premium notes; the law implies the right of the company to insert a forfeiture clause for enforcing payment of interest, and thus avoid accumulation of unpaid interest. (*New York Life Insurance Company v. Statham*, 93 U. S., 24, 30.) The cases holding otherwise are those where the clauses in the original policy are entirely different from those above quoted, as shown in *Cowles v. Continental Life Insurance Co.*, in the Supreme Court of New Hampshire, (2 New England Reporter, 247), and in *Bruce v. Continental Life Insurance Company*, in the Supreme Court of Vermont, (2 New England Reporter, 635.) These cases were decided upon clauses which did not provide that the new policy should be subject to the payment of interest on outstanding premium notes. (*The People v. Knickerbocker Life Insurance Company*, 103 New York Court of Appeals, 480.)

Assignment of Policy by Husband.—Since about 1880 many states passed laws requiring the wife to join in the assignment of a policy of life insurance by the husband wherein she was the assured or beneficiary.

An endowment policy upon the life of G. was issued to his wife in 1870, payable in fifteen years. The policy provided the usual clause, that “in case of the death of Mrs. G. before the death of G. (the insured, her husband,) the amount of said insurance shall be payable after her death to her children, for their use, or to their guardian, if under age; or, if she shall have no children, to her executors, administrators or assigns.”

About 1881 Mr. and Mrs. G. united in a written assignment, signed by them, of all their right, title and interest, in and to said policy, to one A. A. died before the policy matured, hence his executor brought suit against the insurance company to recover the amount of the policy. Mrs. G. was substituted as defendant, and the company deposited the money in court.

Mrs. G. set up in her defense that the assignment made by her and G. to A. was void, because she was a married woman having children who had an interest in the policy, and also that the assignment was not made in conformity with the statute. The Supreme Court and the Court of Appeals decided against her on both points, and held that the assignment was valid, because—1. The fact of signing the assignment by both Mr. and Mrs. G. was a written consent to sell by both, and—2. That, although there were children, husband and wife, joining, may assign or surrender a policy. Had the wife been dead the husband could not have sold the policy, as then the interest of the children in the same would have been that of their mother, and the consent of her legal representatives was necessary. Their interest then was *vested* and not *contingent*, as in the case presented.

The statute referred to (as provided in Chapter 248, Laws of 1879,) states “All policies of insurance heretofore or hereafter issued within the State of New York, upon the lives of husbands, for the benefit and use of their wives, in pursuance of the laws of the state, shall be, from and after the passage of this act, assignable by said wife with the written consent of her husband; or in case of her death, by her legal representatives, with the written consent of her husband, to any person whomsoever, or be surrendered to the company issuing such policy, with the written consent of the husband.”

This provision is the same or similar in other states. (See *Anderson v. Goldsmidt*, 103 N. Y. Court of Appeals, 617.)

Recent Cases on Benefit Insurance.—In *Taylor v. National Temperance Relief Union* (Missouri, November 28, 1887, 17 Ins. L. J., 109), the following points were ruled:

In the certificate of a benevolent association it agreed to

make an assessment upon all the members subject to assessment, and pay the amount collected, not exceeding one thousand dollars, less the cost.

Held, that in an action against the association to recover damages of \$1,000 and for proper relief, a petition which averred a refusal to pay the sum, but which failed to aver that it had made and collected an assessment, was fatally defective on demurrer.

Held, that the action should properly be brought at law if solvent, or if insolvent, perhaps equity might be sought.

Where the assessment need not be made until sixty days after proofs, the petition should aver the making of proofs.

When there is no power to change the beneficiary it cannot be claimed that the latter, in case of death prior to the insured, has a mere expectancy.

In *Mendt v. Iowa Legion of Honor* (October 19, 1887, 17 Ins. L. J., 133), the following points were ruled:

An instrument purporting to be a will, but which could not be admitted to probate because not witnessed in the manner prescribed by statute, was not effectual to change the beneficiary of a life policy.

The constitution of a benevolent society provided that a member might change the beneficiary by authorizing such change in a prescribed form, in writing, on the back of the certificate, attested by the secretary, and by him reported.

Held—1. That an oral agreement by the secretary, that the instrument purporting to be the will should be regarded as changing the beneficiary, was not a compliance with the constitution, and was ineffectual to work such change.

2. That though the original beneficiaries had only an expectancy during the life of the insured, their rights attached upon his death, and they were entitled to object to an illegal change of the beneficiary.

Benevolent Society.—Who are the Legal Beneficiaries.—Effect of Marriage by a Member.—Bill of interpleader to determine to whom the plaintiff should pay a certain death benefit payable upon the death of one John J. Callahan. Hearing in the Supreme Judicial Court before Devens, J., who reported the

case to the full Court. The facts appear in the opinion. (Supreme Court of Massachusetts, March, 1888.)

DEVENS, J.—The Massachusetts Catholic Order of Foresters is a beneficiary association, originally formed on July 30th, 1879, under the statute of 1874, Chapter 375, as amended by the statute of 1877, Chapter 204, (Pub. Stat., Chapter 115.) The directing and governing body of the organization, or order, consisted of what was termed a high court, which was composed of representatives from the subordinate courts, to which the members of the order individually belonged. It is through the high court, acting by means of requisitions on the subordinate courts, that the sums payable on the decease of the members, respectively known as death benefits, or endowments, are collected and paid. The association which brings this bill of interpleader concedes its liability and avers its readiness to pay the sum of \$1,000, which became due on the decease of John J. Callahan, to the person legally entitled thereto. John J. Callahan became a member of the order on the 10th day of June, A. D. 1883, and remained in good standing until the day of his death, on the 24th day of February, A. D. 1886, having paid all the assessments made upon him. In his application for membership, which was according to the form prepared by the association, he designated his mother, Mrs. Catherine Callahan, as the person to whom the sum due as endowment should be paid in the event of his decease. John J. Callahan was not then married; he did not then, or afterward, live with his mother, nor was she then, or afterward, dependent upon or supported by him. He subsequently married Mrs. Mary J. Callahan, who survived him, but who is now deceased. An administratrix has been appointed on her estate, Mrs. Hannah Keefe, who was the mother of Mrs. Mary J. Callahan. Mrs. Keefe is also the next of kin and sole heir of her daughter. The sum due from the association is claimed by Mrs. Catherine Callahan, under the designation made to her in the application for membership which was never changed. It is also claimed by Mrs. Keefe, either as administratrix, or next of kin, (as the Court shall deem most correct), upon the ground that the designation

of his mother, as the beneficiary of the fund due on his decease, could not legally have been made by John J., and that under Section 5, Article 16, of the constitution of the subordinate courts, by which it is provided that "in case no direction has been made by a brother, either by will or entry in his application for membership as to the disposal of his endowment, the trustees of the court of which he was a member may cause the same to be paid to the person, or persons, whom they may find entitled thereto," it should be held that Mrs. Mary J. Callahan was the person entitled thereto.

Under the Statutes of Massachusetts, as they existed in 1879, when the corporation was originally formed, the only right which the association had to provide for or to accumulate a fund for the purpose of paying a sum upon the decease of its members was "for the purpose of assisting the widows, orphans, or other persons dependent upon deceased members." (Pub. Stat., Chapter 115, Section 8.) This section was amended by the statute of 1882, Chapter 195, Section 2, providing that the fund thus authorized should be "for the purpose of assisting the widows, orphans, or other relatives of the deceased, or any persons dependent on deceased members." The association republished its constitution and by-laws in 1882, subsequent to the passage of the act of 1882, with certain alterations made subsequent thereto, although the existence of that act is not alluded to or noted. These changes had no reference to nor were they occasioned by reason of the large powers with which the corporation was invested. They related to matters of detail only. It was under this constitution of 1882 that the association was conducting its business when John J. Callahan became a member in 1883. It is the contention of Mrs. Keefe that, although Mrs. Catherine Callahan, as the relative of her son, might have been designated under the statute of 1882 as a beneficiary, yet this statute had never been adopted by the association. The statute required no formal adoption. It enlarged the powers of this and other similar beneficiary associations. When, after the passage of the Act of 1882, the association accepted the application of John J. Callahan,

and the designation which he might then lawfully make, it could not be said by it, or by any claimant, that it was exercising, and was only authorized to exercise, the more limited powers which it had under the earlier statute. It is also contended, that by its constitution the association had so limited itself, that it could not accept a designation of the mother. We have no occasion to consider whether a beneficiary association might not, by its constitution, so limit itself in its operations, that its endowments should be only for the benefit of one or more classes of those whom it might lawfully entitle thereto, as for the widows only, or as orphans only of deceased members. We find no such intention manifested by this association. The argument on behalf of Mrs. Keefe is that the constitution of 1882, under the title, "Object," has the effect to limit the benefits of the association to two classes of persons, only widows and orphans. The "name and object" of the association are stated in a preamble to the constitution. It is declared that the object of the organization is to promote friendship, unity and true Christian charity. It defines these respectively, unity as "unity in uniting together for mutual support and in making suitable provision for the widow and orphan." It would be a very forced construction to infer from this generality that the association had thus excluded itself from making provision for those who were dependent on the deceased which it legally might make when the constitution was originally framed, or for his relatives which it might lawfully make when Callahan became a member. The constitution of 1879, which was the one originally made, and that of 1884, which was in force when Callahan died, are each prefaced by the same recital of "name and object," yet each constitution declares, in defining the duties and powers of the subordinate court, that the principal object of the association is to secure "to the dependents of its members" the sum of \$1,000, payable on the death of such member. It is thus manifest, that under these two constitutions it could not have been intended to limit the benefits of this association to the widows and orphans, merely because they alone are mentioned in the declaration of its

"name and object." In the constitution of 1883, in defining the powers of the subordinate courts, the phrase above quoted as to securing "to the dependents of its members," \$1,000 is not used. Under the constitution, to hold that because it had adopted as its preface a statement that among its purposes was a suitable provision for the widow and orphan, it could not provide for others as "relatives" or "dependents" for whom the statute permits such association, would not be a reasonable construction. The deceased member had a right to designate as the beneficiary of the fund any person coming within the statutory provisions which enumerate those who may be thus designated. The law which permitted a relation merely, not being necessarily a dependent, to be designated, was in force when he made his designation. The designation of his mother by the deceased was, therefore, one to which the association had a right to assent, as it did assent, by accepting the order of the deceased. (*American Legion of Honor v. Perry*, 140 Massachusetts, 580; *Elsev v. Odd Fellows Mutual Relief Association*, 142 Massachusetts, 226; *Briggs v. Earl*, 139 Massachusetts, 393.) This was not revoked by the subsequent marriage of John J., and his mother, Mrs. Catherine Callahan, is now entitled to receive the fund of \$1,000. Decree accordingly.

Change of Beneficiary.—Action of contract upon a certificate of insurance issued by the defendant society upon the life of Thomas G. Rice. At the trial in the Superior Court, without a jury, before Thompson, J., it appeared that on the seventh day of July, 1883, Thomas G. Rice was indebted to Frederick H. Rindge, Clarissa H. Rindge and Francis J. Parker, administrators of the estate of Samuel B. Rindge, in the sum of \$6,363, and on said date the defendant, a corporation duly established under Chapter 3175 of the Acts of 1874, as amended by Chapter 204 of the Acts of 1877, issued the certificate of policy (said administrators being beneficiaries thereunder,) as collateral security for the payment of said indebtedness. The word "re-issue" was on the face of the certificate, and referred to the fact that on November 7, 1879, on the application of Thomas G. Rice, a certificate was issued

to him, in which his wife, Ellen C. Rice, was named as beneficiary, and on the 7th day of July, 1883, this certificate was substituted therefor. In the certificate of organization made by the officers, and the certificate of incorporation issued by the secretary of the commonwealth, under the provisions of Section 4 of Chapter 375 of the Acts of 1874, the purpose of which said corporation was constituted was stated to be to render assistance to the widows, orphans, or other dependents of deceased members, and also to promote the cause of temperance. The other evidence in this case was the same as in the case of *Rice v. New England Mutual Aid Society*, reported *ante*; and the Court ruled that the certificate was forfeited by reason of non-payment of the assessment called for, found for the defendant, and reported the case to the Supreme Judicial Court. Other facts appear in the opinion. Hutchins and Wheeler, for the plaintiff. Ely, Gates and Keyes, for the defendant.

C. ALLEN, J.—The designation of beneficiaries in the policy or certificate of membership is invalid, as the statutes under which the defendant corporation was organized did not authorize it to grant insurance for the benefit of friends. (*Daniels v. Pratt*, 143 Mass., 221.) But an invalid designation of beneficiaries does not render the whole contract invalid. The contract in terms recognized that there may be a change or substitution of beneficiaries, and there is a provision that if the member shall survive all original or substituted beneficiaries, then his membership shall be for the benefit of his legal heirs. This provision is within the authority of Statutes of 1882, Chapter 195, Section 1, heirs being included under the head of relatives, and if there is no other legal designation this may take effect. (*Daniels v. Pratt*, *ubi supra*.) By an amendment the action is now prosecuted in the name of the administrator of the estate of the assured, and he is the proper party to maintain the action. (*Bailey v. New England Insurance Company*, 114 Mass., 177, and cases cited; *Flynn v. North American Insurance Company*, 115 Mass., 449; *Unity Association v. Dugan*, 118 Mass., 219.) This is not controverted, but the defendant contends that the

declaration avers that the action is brought for the benefit of Rindge, and therefore that the action cannot be maintained. This objection cannot be supported. If the plaintiff receives the money, it will be a good discharge to the defendant of its liability, and the defendant will not be responsible for the proper application of the money by the plaintiff. It is to be assumed, at this stage of the proceedings, that he will dispose of the funds properly, and he may be compelled to do so, by judicial proceedings to which the defendant would not be a necessary party. (Gould v. Emerson, 99 Mass., 154; Bailey v. New England Insurance Company, 114 Mass., 177.) The averment that the action is brought for the benefit of Rindge is unnecessary, and may be disregarded. Since the action is now prosecuted by the proper plaintiff, we need not consider the effect of Statutes of 1885, Chapter 183, which the plaintiff relies on as enlarging the effect of the defendant's contract. The other objections to the plaintiff's recovery depend on the same facts which were considered in the case of Rice against the same defendant, (reported above), where it was held that the defendant must be deemed to have waived the forfeiture.

According to the terms of the report the entry must be judgment for the plaintiff. (Frederick H. Rindge v. New England Mutual Aid Society, Supreme Court of Massachusetts, March, 1888.)

Marine.—Insurance on Cargo “Until Safely Landed.”—Discharge on Lighters for Transshipment.—Risk Not Covered.—One of the forms of the question, how far goods are covered by a marine insurance policy after being discharged into lighters at the end of the voyage, was decided by the British Court of Appeal in the case of Houlder Brothers & Co. v. The Merchants Marine Insurance Company, limited. (Law Rep., 17 Q. B. D., 354, 1886.) A cargo of rails was shipped on the Steamship Kirkstall, under a policy describing the risk as “at and from Hull to London, including all risk of craft, until the goods are discharged and safely landed.” When the rails arrived in London they were discharged into lighters, not with the intention of landing them, but of loading them into

other ships for exportation to Sydney. Some of the lighters, with the rails on board, were sunk by a gale, and an action was brought against the insurance company for salvage and average expenses. It was proved at the trial that almost all rails sent coastwise to London are reshipped for export without being landed. Consequently the plaintiff claimed that the terminus *ad quem* which the parties contemplated was the export ship—that is, that the cargo was not “safely landed” until it was put on board that vessel. On the other side it was contended that the word “landed” must be taken in its ordinary and natural meaning unless there is some custom which controls the interpretation. No such custom was proved. When the goods were put into the lighters to be carried to the export ship, instead of being landed, it was argued there was an abandonment of the voyage and a commencement of the new voyage.

In the trial court it was held that “the underwriters were discharged because the accident happened after the expiration of a reasonable and ordinary period from the time at which the goods had been placed on the lighters for transshipment.” The Court of Appeal affirmed the judgment, but in doing so took the broader ground that the risk was terminated by discharge upon the lighters. The Court said:

“The risk insured against is the risk of the transit upon the lighters which have in the ordinary course of business to convey the goods to the shore. * * * Cargo discharged upon lighters for transshipment is * * * exposed to a peril which is not the same as that which it encounters if discharged upon lighters to take it to the shore at once. It is perfectly true that by taking delivery short of the shore the consignee determines the risk insured. But this is not because in such a case the risk is terminated by an actual landing, but because the consignee waives the landing and himself terminates the risk instead by taking delivery short of the land. Nobody in commercial or business language can say that goods are landed which are transshipped without landing, or that goods which are placed in lighters for transshipment are placed in lighters to be landed. It was no doubt

proved conclusively on the trial that steel rails which are consigned by coasting vessels to London are most commonly transshipped into export vessels at London without being landed, and underwriters no doubt must be taken to be familiar with the ordinary incidents of the trade and of the transit of the goods insured. But this falls far short of proving that by any custom transshipment is equivalent to landing.

"We are told that it is unusual in such cases to make the policy in any other form than that in which it was made. If this be true it only follows that it is usual in these cases not to insure the risk which has really to be run. Policies which provide for transshipment are perfectly familiar to all commercial lawyers, and if those who consign steel rails to London are in the habit of transacting their business by means of policies which do not contain the appropriate and proper clause the shippers, if a loss happens outside of the risk against which they are insured, must take the consequence of not having protected themselves by the proper contract of insurance. The goods here have been lost, but by an accident not covered by the policy."

INTEREST.

If a Mortgage or Other Contract Stipulates For a Certain Rate of Interest, and After Maturity the Statutory Rate is Higher or Lower than the Contract Rate, Which Prevails?—Opposite Rule in Different States.—Many mortgages receiving seven per cent interest were running in New York State when the legal rate was reduced by statute to six per cent. The question at once arose, what rate was now collectible upon these securities? In Vermont the same question in principle, though somewhat different in form, came up in a suit to foreclose a mortgage made to secure certain bonds of the Burlington & L. Railroad Company, a Vermont corporation, bearing seven per cent interest. At the date of the foreclosure proceeding the bonds were overdue, and the legal rate in Vermont was six per cent. The United States Circuit Court, district of Vermont, ruled on this point as follows:

“Question has been made as to the right to the special rate of seven per cent interest after the falling due of the bonds. This is a Vermont contract, to be construed by the laws of Vermont. This question arose upon bonds and mortgages of the Rutland & Burlington Railroad, in *Cheever v. The Rutland & Burlington Railroad Company*, in the Supreme Court of Vermont, the highest court of the State, at the general term, 1869, not reported in the State reports. In that case it was held that the principal of the bonds bore interest at the special rate after they were due as well as before, and the interest coupons at the usual rate allowed by law from the time when they fell due. Opinion by Steele, J. Pamph., 18, 19. The reckoning stated from the master’s report is in accordance with this decision, which is controlling upon this question.” (*Jackson & Sharp Co. v. Burlington & L. R. Co.*, 29 Federal Reporter, 474.)

The earlier New York cases, as interpreted by the Massachusetts Supreme Court, in the case of *Brannon v. Hursell*, 112 Mass., 63, adopted the same rule, and it was said by the Court in that case that it was then the established doctrine in Indiana, California, Texas, New Jersey, Illinois, Wisconsin, Iowa, Nevada, Tennessee, Ohio, Michigan, and Virginia. It has also been adopted in Nebraska. Later New York cases were interpreted by the United States Supreme Court in *Brewster v. Wakefield*, (22 How., 118,) as holding the contrary doctrine that the contract rate governed only until the maturity of the contract, and the legal rate only could be thereafter collected.

NOTE.—We have ventured, on this point, to make considerable use of a paper by one of the present writers, Mr. Olmsted, contained in the “Proceedings of the Convention of American Bankers Association,” at Saratoga, (1884, p. 31.) This case was carried up from Minnesota, and the rule there established has been adopted in Kansas, South Carolina, Rhode Island, Kentucky, Arkansas, and Maine. It is admitted, however, in some of the decisions upholding this principle, “that the intent of the parties, if expressed with sufficient clearness in their contract, will govern the rate of interest to the time of judgment.”

What Constitutes Usury.—Money to be Paid on Contingency.
—Where the promise to pay a sum above legal interest depends upon a contingency and not upon the happening of a certain event, the loan is not usurious.

A borrower secured a loan by pipe line certificates, agreeing to pay seven per cent interest, and was to have the privilege of keeping the money until the certificates were worth \$1.15 a barrel in the open market. Held not a usurious contract.

The facts in this case as found by a special verdict are that D. A. Ralston, who is represented in this case by his assignee, Truby, borrowed in 1880 from James E. Brown, since dead, and represented by Mosgrove *et al.*, his administrators, various sums of money, amounting in all to \$60,000. He secured this loan by the pledge of United Pipe Line certificates as collateral security, at the rate of 1,000 barrels of oil for each \$1,000 borrowed. The certificates were sold by the defendants about the 20th of November, 1882, who realized therefrom \$870.31 in excess of the said debt and six per cent interest thereon.

When the loan was made it was agreed in writing that Ralston should "pay seven per cent as long as he retains the same, not to be less than four months, and Ralston to have the privilege to retain the money until United Pipe Line certificates are worth in the open market \$1.15 per barrel."

Opinion by PAXSON, J. Filed January 3, 1888. On an appeal from decision of Ct. of Common Pleas of Armstrong County.

The learned judge of the court below entered judgment in favor of the defendants upon the special verdict. In this there was no error. The contract between Brown and Ralston, while resembling somewhat a contract for the loan of money, was not so in substance. It was practically a venture or speculation in oil, with a capital to be furnished by Brown. If unsuccessful, that is, if oil never reached \$1.15 per barrel, the loss fell on Brown; if successful, Brown was to get his money back with seven per cent interest. In other words he risked the capital with the chance of getting one per cent above legal interest as profit. We do not see any taint of usury in this. It is settled law that when the promise to pay a sum above legal interest depends upon a contingency and not upon the happening of a certain event, the loan is not usurious. This was decided in *Philadelphia & Reading Railroad Company v. Stichter*, 11 W. N. C., 325. And see, also,

Spain v. Hamilton's Administrator, 1 Wall., 604; Corcoran's Case, Id. In Philip v. Kirkpatrick, Addison, 124, the principle is thus stated: "If money be lent, payable on a contingency, which may never happen, as the arrival of a ship, more than legal interest may be reserved on the payment and it is not usury, for the lender risks the loss of the whole." Judgment affirmed. (Supreme Court of Pennsylvania, Truby, assignee, etc., v. Mosgrove *et al.*)

JUDGMENT.

For All Purposes is Like a Contract.—The Court of Appeals (New York) held in a case to appear in 20 Abb. New Cases, reversing the Supreme Court, that a judgment is a contract for the purposes of the remedies incidental to actions on contract. This is a sensible rule. The remedies peculiar to actions on contract all rest on the fact that if defendant has contracted, it is reasonable to allow simpler and directer methods of procedure than if he were merely contending against a liability for unliquidated damages for a tort, or against a penal liability.

If his liability has been established by judgment, it is just as good for the purpose of suing as if he had stipulated.

The decision is put on the ground that the judgment merges not only the cause of action, but also the right to provisional remedies peculiar to the original cause of action. There is, however, an exception to this rule in the case of a foreign judgment and the provisional remedy of arrest.

The result is that after recovering a money judgment, whether domestic or foreign, and whether on contract or in tort, (unless it was confessed merely as security, or unless the judgment has been opened and allowed to stand as security pending further litigation), plaintiff suing again must sue on the judgment.

If the judgment is a *domestic* judgment plaintiff may have attachment, if defendant is a non-resident or foreign corporation, or a resident guilty of fraudulent disposal, etc., of property, or concealment to avoid summons, etc. Plaintiff may have arrest, if defendant is guilty of fraudulent disposal, etc., of property.

If the judgment is a *foreign* judgment, plaintiff may have attachment in the same cases only as in an action in a domestic judgment, and may have arrest in the same case as in an action on a domestic judgment, and also in any case where defendant might have been arrested in an action on the original demand.

LEASE.

Lien Given to Landlord on Goods, Effect of.—A. took a lease of B. for five years of a store at the rent of \$2,000 for the first year, and a greater sum thereafter, payable monthly in advance, and in case of a default in payment, or seizure of the goods and merchandise, or other personal property in or upon the premises, by virtue of any suit, judgment, execution, assignment or otherwise, the whole amount of such rent agreed to be paid should immediately become due and payable.

There appeared this clause in the lease: “And it is further agreed, that the lessor shall have a lien as security for all the rent, water rates, for damage to building, upon all the merchandise, chattels, fixtures and other personal property, which are, or may be in or put on the demised premises, belonging to the lessee, (A.,) or claiming under him as assignee, under-tenant or otherwise, and such lien may be enforced on the non-payment of any of said rent or water rent, by the taking of such property and the sale thereof in the same manner as in case of a chattel mortgage on default thereof,” etc.

It was agreed that the lessee (A.) “should remain in possession of said mortgaged goods in said store, and that he might sell the goods covered by said mortgage, in said store, and use the proceeds in his business, buying other goods with the money as opportunity offered, and using the proceeds of the sales to meet his liabilities, and in the prosecution of his business, etc. That at the time said chattel mortgage lease was executed, the lessee (A.) was in possession of store and mortgaged goods, and continued therein as he did before the chattel mortgage lease, in carrying on his retail business, in all respects as if no mortgage were in existence, all of which

was done with the knowledge and approval of the lessor (B.) That B. never had possession of the goods covered by the chattel mortgage lease."

About two years after the lease was executed A., the lessee, made a general assignment to C. of all his property, including that upon the leased premises, for the benefit of his creditors. C. took possession of the goods and sold them without notice to B., the lessor. B. then demanded of C. the rent or the goods and fixtures in the store.

By statute law the landlord (B.) could not obtain priority over other creditors for the collection of rent, as was intended by the contract of lease, and his debt for rent must be enforced like other obligations. (In New York it was abolished by Laws of 1846, Chapter 274.)

The contract was a valid one between the landlord (B.) and his tenant (A.) as to the merchandise then in the premises, as well as to other goods acquired later on. In similar cases the same was held. (See 65 N. Y., 459, and 71 N. Y., 113.)

But here in this case the landlord raises the question of his prior right to the goods as against the tenant's assignee for the benefit of his creditors. The landlord makes his stand that the assignee is in no better position than his assignor, (A.), the tenant, and that he, the landlord, is entitled to the proceeds of the sale.

The Court held that that was not so, because the assignee represents creditors, and may treat all agreements made in fraud of their rights as void.

There was no change of possession of the things covered by the agreement between A. and B., nor a delivery of them, and it was so agreed that there should be neither. This was a void agreement even at common law. (Twyne's Case, 3 Coke, 80.)

This agreement was in the nature of a mortgage. Its object was to prefer B., and it formed a cover for a secret trust in favor of A., which is in the nature of a fraud upon the other creditors of A. The statute makes a mortgage of goods and chattels upon any condition whatever, without a delivery and without a change of possession, fraudulent as against the creditors. The question of date or time of the creation of the

debt as before or after the lease was executed was immaterial.

It is against all principles of equity that B. should maintain his lien to the exclusion of all other *bona fide* creditors. A. was allowed by B. to sell the goods as though no lien existed, nor was any restraint put upon him as to the money obtained from the sales. (*Reynolds v. Ellis et al.*, 103 N. Y., 115.)

Waiver of Notice to Continue Lease.—L. executed lease of a store to S. containing this clause: "And it is further agreed that the party of the second part (S.) shall have the privilege of continuing this lease for two years at the annual rental of \$600, to be made in monthly payments in advance on the first day of each and every month during said lease, by first giving written notice to the party of the first part (L.) on the first or during the month of February (before the renewal) of such intention." The store was vacated by S. four months after the new term expressed above commenced. He paid no rent after vacating.

The parties to the lease waived the written notice as provided therein by their acts in continuing in the premises after the first term expired, and paying the increased rent up to the time S. vacated them. This waiver was implied from their conduct irrespective of the question of benefit to be derived from the written notice to L., or to S. as the tenant.

L. refused to terminate the lease until the expiration of the two years, and refused to accept the pay. S. was liable for the rent of the balance of the term of lease, for twenty months.

S. attempted to show the action was barred by the statute of limitations, but this is met by the fact that the lease was executed under seal. (*Long v. Stafford*, 103 N. Y., 274.)

Landlord and Tenant.—In *Cowen v. Sunderland*, Massachusetts Supreme Judicial Court, which was a suit by a tenant against her landlord for damages resulting from falling into a cess-pool in the yard, covered by rotten planks, which were concealed by earth on which grass and weeds were growing, there was evidence that the same had never been pointed out to her by the defendant, and that she was ignorant of its position and dangerous character, and that defendant had

directed the cover to be repaired with old boards some time previous, and was present when such repairs were made. The Court held that it should have been left to the jury to say whether defendant knew of the defective covering and the danger therefrom, and had neglected to inform plaintiff of it; and also whether plaintiff had been injured in consequence of her failure to make a proper examination of the premises. It is a general rule, well established by the decisions of this Court, that the lessee takes an estate in the premises hired, and takes the risk of the quality of the premises, in the absence of an express or implied warranty by the lessor or of deceit. If, therefore, he is injured by reason of the unsafe condition of the premises hired, he cannot ordinarily maintain an action in the absence of such warranty or of misrepresentation. The rule of *caveat emptor* applies, and it is for the lessee to make the examination necessary to determine whether the premises he leases are safe, and adapted to the purposes for which they are hired. There is an exception to this general rule, arising from the duty which the lessor owes the lessee. This duty does not originate directly from the contract, but from the relation of the parties, and is imposed by law. While there are concealed defects attended with danger to an occupant, and which a careful examination would not discover, known to the lessor, the latter is bound to reveal them in order that the lessee may guard against them. While the failure to reveal such facts may not be actual fraud or misrepresentation, it is such negligence as may lay the foundation of an action against the lessor if injury occurs. The principle that one who delivers an article which he knows to be dangerous to another, ignorant of its qualities, without notice of its nature or qualities, is liable for an injury reasonably likely to result, and which does result, has been applied to the letting of tenements.

It has thus been held that where one lets premises infected with the small-pox, and injury occurred thereby, he was liable, if knowing this danger he omitted to inform the lessee; this upon the ground of his negligent failure to perform a duty which he owed the lessee. It was not deemed important whether the omission to give the information was intentional or otherwise.

Obviously, there may be many concealed defects and dangers about a house which careful examination will not discover. If these are known to the lessor, it is for him to reveal them. Traps or contrivances may exist by means of which the most careful occupant might be injured. "Such traps or contrivances," says Mr. Justice Field, "are not merely a want of repair; they are in a sense active agencies of mischief, which no tenant would expect to find, even in a decayed and ruinous tenement." (*Bowe v. Hunking*, 135 Mass., 380.) In *Reichenbacher v. Pahmeyer*, 8 Bradw., 217, the defect alleged was in the manner of hanging a chandelier. The chandelier was hung unsafely, and the lessor knew it, and did not disclose this fact to the lessee. It was not apparent to an observer. It was held that the lessor was liable to a servant of the lessee who was injured by its fall. In *Bowe v. Hunking*, *ubi supra*, it was held that the case then at bar was not within the exception of the general rule by which a lessor is rendered liable for negligence of this character. There was no evidence that the defective step by which the injury in that case occurred was known to the lessor or her agent to be unsafe; and further, this defect itself was obvious, and whatever danger existed was readily seen by examination.

LICENSE AND TAXATION.

Taxation not License.—The Ohio (Dow) Liquor Tax Law.—Certain liquor dealers of Cuyahoga county, Ohio, brought an action to restrain the county treasurer from collecting the assessments made upon them as sellers of intoxicating liquors under the Act of the General Assembly passed May 14, 1886, entitled "An Act providing against the evils resulting from the traffic in intoxicating liquors." (33 Ohio Laws, 157.) A temporary injunction having been allowed, on a motion to dissolve the injunction, the Court granted the motion and dismissed the petition of the liquor dealers. The Supreme Court pointed out the fact that if the law was valid relief could be had only in separate actions, and then addressed itself to the broader questions involved.

"The general grounds upon which the invalidity of this law is asserted," said the Court, "are (1) that it grants a license

to traffic in intoxicating liquors; (2) that it is in substance a tax on property, not levied by uniform rule according to its true value in money; (3) that the summary method which it prescribes for the collection of the tax is not due process of law; and (4) that it is a law of a general nature, not uniform in its operations throughout the State."

On the first point the Court said—"The competence of the General Assembly to provide against the evils resulting from the traffic in intoxicating liquors by tax levied upon the business, without infringing the provision of the (Ohio) Constitution that no license to traffic therein shall be granted was recognized in *State v. Hipp*, 38 Ohio St., 199, was directly affirmed in *State v. Frame*, 39 Ohio St., 399, and was not denied in the subsequent cases. (Several cited.) * * *

Unless it can be shown that a simple tax on the traffic enlarges the privileges of those engaged in it, or confers a right that did not previously exist, there is no ground for saying that the tax is a license for the business. * * *

The distinction between the tax upon a business, and what might be termed a license is, that the former is enacted by reason of the fact that the business is carried on, and the latter is exacted as a condition precedent to the right to carry it on. In the one case the individual may rightfully engage in and carry on the business without paying the tax; in the other he cannot."

On the second point the Court said—"This is an assessment of the form and nature of a tax upon the business of trafficking in intoxicating liquors carried on by any person in this State, and—Is there power in the General Assembly to levy a tax upon this business?—is the question. We think without doubt there is. As observed, it is not material as to what the power should be called. But as we think it may properly be termed a police power recognized by the Constitution as within the legislative authority conferred by that instrument upon the General Assembly over the business of trafficking in intoxicating liquors." * * * * *

On the third point—"The next objection to the validity of this statute is that the summary methods by which the tax

and penalties imposed by it are assessed and collected deprive the individual of the guarantee contained in the 16th section of the Bill of Rights, that 'every person for an injury done him in his lands, goods, etc., shall have remedy by due course of law;' and for a like reason violates the clause in the 14th amendment to the federal Constitution, 'nor shall any state deprive any person of life, liberty or property without due process of law.' * * * * Due course and due process of law are one and the same thing. We do not feel required to enter upon any extended discussion of this important constitutional guaranty. For whatever doubt there may be in its application to a variety of cases, it is well settled that it does not affect the usual modes that have been long adopted for the assessment and collection of taxes. In other words these modes are recognized as due process of law."

On the fourth point—"The objection to the statute, that it is not uniform and general in its operation, is based upon the fact that it does not include the manufacture of intoxicating liquors from the raw material, and the sale thereof by the manufacturer of the same in quantities of one gallon or more at any one time." The Court likened this provision to one drawing the line between a felony and a misdemeanor at a point just above and below the larceny of \$35, or to a statute (in Ohio) fixing the legal age of majority in males at twenty-one, and females at eighteen, and said—"The generality and uniformity of these laws has never been questioned." (*Adler v. Whitbeck*, 7 Western Reporter, 201.)

MISCELLANEOUS.

Damages Arising from Injury.—A case of some interest on statutory actions, and the abatement of an action by death is that of *Burns v. Grand Rapids, etc., Railroad Company*, (Ind., January 24, 1888,) 15 North-Eastern Reporter, 230. Although, at common law, actions *ex delicto* for injury to the person abate upon the death of the person injured, yet where the statute in the state in which the injury is inflicted gives a right of action to the personal representative in such case, it

is here held, in approval of New York cases, that that right may be enforced in another state having a similar statute, in a court having jurisdiction of the defendant.

Judge Mitchell says: "It is not perceived why a right of action transitory in its nature, arising *ex delicto*, under a statute of a foreign state, should not be as readily enforced by the courts of this State as are those which arise *ex-contracted*, but which depend for their validity upon the statute of a foreign state. Rights of the latter class are enforced without hesitation. Some of the decisions seem to rest upon the principle that rights acquired or liability incurred under a statute in one state, will not be enforced in a foreign state, unless the law of the former and that of the place where the right of action accrued are of similar import and character, or unless both concur in giving a right of action for the injury complained of. (Leonard v. Steam, etc., Company, 84 New York, 48, and cases cited; Boyce v. Railroad Co., *supra*.) Other well-considered cases proceed upon the theory that, in order to justify a court in one state in refusing to enforce a right of action which all need under the law of another state, it must appear that the liability sought to be enforced is against good morals or natural justice, or that the enforcement of the law would be prejudicial to the general interests of the citizens of the state whose courts are asked to give it effect. (Herrick v. Railway Company, 31 Minnesota, 11; 16 North-Western Reporter, 413, and cases cited.)

"The statutes of the states of Indiana and Michigan are so nearly identical in import and character as to manifest the close coincidence in the policy of the two states in respect to the statutes applicable to cases like the present. Under such circumstances there is, as is said in the case of Railway Company v. Richards, (4 South-Western Reporter, 627,) a general concurrence of authority to the effect that the courts in either state, which can by their process obtain rightful jurisdiction over the person of the defendant, will enforce liabilities arising in the other. We need, therefore, give the question above suggested no further consideration, except to say that the better view, as applied to actions for death caused by negli-

gence, seems to be that taken by the Court of Appeals of the State of New York, which is, that while the statutes of the different states involved need not be alike in detail, they should be of the same import and character. (Story Conf. Law, 845, note.) Indeed this seems to be the better view in any case where the statute of a foreign state has made that actionable for which an action was expressly forbidden by the common law, since by the adoption of the common law it may plausibly be urged that prohibition was also adopted in the absence of an express statute making that actionable for which an action was previously forbidden. All the cases agree, that, whatever the law of the forum may be, the plaintiff's case must stand, if at all, so far as his right of action is concerned, upon the law of the place where the injury occurred. (Hyde v. Railroad Co., 61 Iowa, 441; 16 North-Western Reporter, 351; Allen v. Railroad Company, 45 Md., 40.)

"In order to obtain an action of tort founded upon an injury to the person or for wrongfully causing the death of the person injured, the wrong which caused the injury and death must at least be actionable by the law of the place where it was committed, if not also by the law of the place where redress is sought. Unless the alleged wrong was actionable in the jurisdiction in which it was committed, there is the cause of action which can be carried to and asserted in any other jurisdiction. (Leforest v. Tolman, 117 Massachusetts, 109; Davis v. Railway Company, 143 Massachusetts, 301; 28 Amer. and Eng. Ry. Cas., 223; 9 North-Eastern Reporter, 815; Deevoise v. Railroad Company, 98 New York, 377; Whitford v. Railroad Company, 23 New York, 465; McDonald v. Mallory, 77 New York, 546.)

"The principle last above stated ruled the decision in the case of Buckels v. Ellers, (72 Indiana, 220.) That was an action by an unmarried woman to recover damages for her own seduction. The injury complained of was committed in the State of Illinois. Notwithstanding the statute in this State which confers upon every unmarried woman a right to prosecute an action for her own seduction in the absence of any thing to the contrary being made to appear, it was

correctly assumed that the common law under which no such action would be maintained was in force in the State of Illinois. It followed, necessarily, that the Court held the action not maintainable. On the authority of a text writer of high repute, it was stated in an incidental way, in the case referred to, that even if it had been shown that there was a statute in Illinois which conferred upon the plaintiff in that case the right to sue for her own seduction, that would not have authorized her to maintain an action in the courts of this State upon principles of comity, as it was only common law rights or such rights as are recognized as existing by the general usage of civilized nations, which can be enforced by comity in a foreign forum. This statement in no way impairs the correctness of the conclusion reached in the case, but in the light of the more recent decisions and authorities, it may be doubted whether the test relied on can be regarded as expressing the law upon the subject with entire accuracy."

Statute of Limitations.—The remedy to enforce a promise to waive the Statute of Limitations was before the Supreme Court of Vermont in *Green v. Seymour*, (5 New England Reporter, 367.) The Court, without deciding whether a consideration other than the original indebtedness is necessary, held that in respect to the question of pleading under the statute requiring a new promise to be in writing, the same rule applies as under the Statute of Frauds; and that the party pleading an agreement which he relies on to satisfy the statute need not allege that it was a written agreement.

In the appeal of *Kauffman*, (Pennsylvania, 1887, 9 Central Reporter, 737,) an attempt was made to extend the doctrine that a beneficiary can require a trustee to plead a statutory bar to the case of creditors attaching a claim of their debtor against which a statute barred offset existed. In this case a son was indebted to his father's estate on notes more than six years due, and refused to plead the Statute of Limitations; and the Court held that an attaching creditor of the son will not be permitted to plead the statute for him.

In *Kitterar's Estate*, (17 Pa., 472,) *Ritter's Appeal*, (25 Pa., 96,) and in kindred cases, the claimants were themselves

creditors of the estate being distributed, direct, and as to their right to interpose the statute, there could scarcely be a question.

In Milne's Appeal (99 Pa., 483,) the share of A. J. Buckner, Jr., in the estate of A. J. Buckner, Sr., deceased, was attached by a creditor of A. J. Buckner, Jr. A. J. Buckner, Jr., was dead, and could not, as Dr. A. J. Rockerfield in the case before us does, acknowledge his indebtedness, and refuse to plead the statute as to the claim of the estate against him; and in that case his creditor was permitted to plead the statute.

When a debtor is alive and acknowledges his indebtedness, and refuses to plead the statute, he cannot be compelled to plead the Statute of Limitations against one of his creditors for the benefit or advantage of another creditor. Nor can one of his creditors interpose the Statute of Limitations against another, where the debtor acknowledges his indebtedness and refuses so to do.

Testimony of Witness on Transaction with a Decedent.—An interesting question in the law of evidence as to the examination of a party against an executor or administrator was before the New Jersey Chancery in McCartin v. Traphagen's Administrator, (10 Central Reporter, 193.) The Court held that the question of the competency of a witness or a party to testify to a transaction with the decedent could not be affected by making one whose interest was that of a plaintiff, a defendant instead of a plaintiff. The action was by one of the heirs and next of kin of a decedent; and others, although the suit was in part for their benefit, were made defendants. The Court said: "This suit was brought as much for their benefit as it was for the benefit of the complainant. The bill so declares. It first alleges that the executors have wasted the estate of their testator, and that the complainant and the other beneficiaries under the will are, therefore, entitled to indemnity from the executors therefor, and then prays that such indemnity may be decreed to them.

"There can be no doubt that if the three Misses McCartin had taken their true position in the litigation, if they had placed

themselves where their interests and their feelings place them, where they are in every thing except the basest form, they would have been incompetent to give the evidence objected to. Although they are defendants in form they are complainants in fact.

“If a decree goes in favor of the complainant, it must, *ex necessitate*, give the same measure of relief to each of these defendants that it does to the complainant, unless some special defense, peculiar to the defendants, and which exists against them alone, and not against the complainant, has been shown. The position of parties having the same rights, in a suit of this kind, is a pure matter of arrangement, over which they have supreme control. The three Misses McCartin were necessary parties to this suit, but they were at liberty to choose their position; they could be either complainants or defendants, just as they saw fit. I have no doubt that they were made defendants, not because they did not want the suit brought, nor because they were unwilling to appear as complainants, nor because it was supposed that there was any conflict between their interests and those of the complainant, nor because it was suspected that they might desire to make defense against the complainant's action, but because it was thought possible that by making them defendants they might be rendered competent to testify to declarations made by Mr. Traphagen, and thus increase their chances and those of their brothers of being able to fasten a liability on Mr. Traphagen's estate.

“The decision of the question under consideration must, of course, be controlled by the statute of 1880. The main design of that statute is, so far as it prescribes a rule of exclusion, to prevent a person who seeks, by judicial action, to fasten a claim on the estate of a decedent from putting in proof, by his own mouth, in support of his claim, any thing the decedent may have said or done tending to show that the claim is valid. The purposes which the legislature had in view in enacting the statute are, I think, quite apparent. They were first to guard against the injustice which might arise from a want of mutuality in the exercise of the right to testify; and second, to prevent the danger which would also

unavoidably arise from perjury, on the suppression of material facts, if the living person to a transaction, where one was dead, was allowed to testify as to what the deceased party had said or done respecting the transaction, in a suit by or against his legal representative.

“The nominal position of the person whose competency is challenged as a party on the record in suit is, in my judgment, of no importance; but the test, in such cases, is, does he stand in a position of antagonism to the estate of the intestate or testator represented in the suit or proceeding in which he is called as a witness, so that if he should testify upon the prohibited subjects, he would give his testimony under a temptation to forget what he should remember, or to commit perjury? If he does, he is incompetent. This I understand to be the test which the Court of Errors and Appeals adopted in *Smith v. Burnet*, 18 *Sterv. Eq.*, 314.”

Money Wrongfully Paid.—A right of action exists in the following cases to recover money back that has been wrongfully paid:

1. Where money has been wrongfully extorted under the statement of an illegal assessment on real estate. (*Jex v. New York*, 103 *New York*, 536; 9 *North-Eastern Reporter*, 39; 4 *Central Reporter*, 781; 8 *Eastern Reporter*, 552.)

2. Where one partner falsely represents to the other that he has paid a partnership debt, and that upon a settlement made between them this payment was taken into account. (*Libby v. Robinson*, 79 *Maine*, 168; 10 *Eastern Rep.*, 838.)

3. Where the owner of a patent makes a statement to a licensee of the same which he believes at the time to be true, and subsequently the patent is declared to be worthless, no recovery could be had; otherwise if falsely made. (*Schwarzenbach v. Odorless Excavating Apparatus Company*, 65 *Maryland*, 34; 2 *Central Reporter*, 859.)

Money Paid Voluntarily.—1. One who voluntarily makes a payment on what he has reason to believe is unsafe as to title or ownership, cannot recover the money so paid thereon. (*Baldwin v. Foss*, 71 *Iowa*, 389; 32 *North-West. Rep.*, 389.)

2. Payment not made under protest in case of an alleged

violation of an ordinance and upon an arrest therefor, but no force or duress exercised in obtaining the money, is construed to be a voluntary payment. (Bailey v. Paulina, 69 Iowa, 463; 29 North-Western Reporter, 418.)

Money Paid by Mistake.—1. Payment of money under circumstances of clear mistake is recoverable yet where the negligence of the party is so gross and the status of the receiving cannot be restored it is otherwise and the negligent party must suffer. (Walker v. Conant, 31 North-Western Reporter, 786; 8 Western Reporter, 181.)

2. Interest paid on a note can be recovered back where on the face of it no interest was to be charged. (Hathway v. Hagan, 59 Vermont, 75.)

Nuisance.—Injunction is the proper form to seek an abatement of a nuisance.

In many states a nuisance can be abated in and by a criminal proceeding.

1. It has been declared to be a nuisance that a mill causing smoke and cinders, which with the noise and vibration of the machinery, rendered the occupancy of a residence near by almost impossible, and impaired the value of the property. (Hurlburt v. McKone, 55 Connecticut, 31; 36 Alb., L. J., 168.)

2. It has been held that a shooting gallery decently conducted is not a nuisance. (Hubbell v. Viroqua, 67 Wisconsin, 343; 30 North-Western Reporter, 847.)

3. A railroad company cannot carry on its business in the use of its round and engine-houses, etc., to the loss of health of the neighbors and the practical loss in the enjoyment of their property unless the authority vested in the company contemplated such extreme uses by the company which so affected the surrounding neighborhood. (Cogswell v. New York, etc., Railroad Company, 103 New York, 10; 8 North-Eastern Reporter, 537.)

Perjury.—In an indictment for perjury the facts must be clearly and unequivocally set forth creating the falsity of the sworn statement, and so known to the person making the

same to be untrue in fact. That the statement was willfully, corruptly and falsely sworn to.

Physicians.—The degree of skill and care to be exercised in a case is a question to be determined by a jury, and much will depend upon the attending circumstances in each and every case.

The liability of a physician or surgeon; the degree of care, diligence and skill required in their professional capacity; the engagement of the physician or surgeon, etc., is treated at length in 24 Central Reporter, L. J., 515.

Revenue.—(I.) CUSTOMS.—“Under the provisions of the Act of March 3, 1865, that duties based upon the value of any specified quantity of merchandise shall not be assessed upon an amount less than the invoice or entered value (13 Stat., 493, Chapter 80, § 7,) the computation of the value of foreign coin stated in an invoice as the value of such goods should be at the rate fixed under the statute in force at the time of the entry, although it did not take effect until after the exportation.” (Heineman v. Arthur, 120 United States, 82.)

“Under the Act of Congress of 1883 (22 Stat., 488), enacting a tariff of duties to take effect on and after the 1st day of July, 1883, and providing that goods in the public stores or bonded warehouses on the day when the Act should take effect should be subject to no other duty than if the same were imported after that day, and that the repeal of existing laws or modifications thereof by that Act should not affect any Act done or right accruing or accrued, goods arriving in port by vessel on June 30, 1883, too late to go into stores or bonded warehouses on that day, and, July 1st being Sunday, not entered till July 2d, are liable to the duty imposed by the Acts previously in force.” (McAndrew v. Robertson, 29 Federal Reporter, 246.)

“The provision of the Revised Statutes that imported merchandise shall be deemed to be the property of the consignee, amended, by enacting that the holder of any bill of lading consigned to order and properly indorsed, or the underwriters to whom merchandise has been abandoned, shall be deemed such consignee respectively; and merchandise ‘saved from a

vessel wrecked or abandoned at sea, or on or along the coasts,' and promptly brought into port in good faith by the salvors, shall be deemed the property of the salvors." (Act of February 23, 1887, 24 Stat., Chapter 221, p. 415.)

"Importers have a right to be present upon a re-appraisal; but it is an appraisal on view, and the re-appraisers have power to ascertain the value of the goods by examination of witnesses and all reasonable means." (*Auffueordt v. Hedden*, 30 Federal Reporter, 360.)

(II.) INTERNAL.—"Although authority to take a bond to protect the United States against loss in the printing of stamps from private dies, as required by the commissioner of internal revenue, (by circular No. 136, of September 30, 1875,) is not given in direct terms by any statute; it is incident to the exercise of the duties of his office." (*United States v. Diamond Match Company*, 30 Federal Reporter, 108.)

Retail liquor dealers cannot escape paying a penalty by forming an association for the purchase of liquor, when they in fact become wholesale dealers without a license as such required by statute. (*United States Revised Statutes*, § 3242; *United States v. Kallstrom*, 30 Federal Reporter, 184.)

Sunday.—The states vary in their laws as to what constitutes a violation of Sabbath, and what is work of necessity or charity.

1. In Maine it was held by the Supreme Court that a contract made on Sunday that "no one shall defend any action upon a contract upon the ground that it was so made, until he restores such consideration received," on the contract. An action is maintainable by one who parted with money or property. (*Wentworth v. Woodside*, 79 Me., 156.)

2. In Rhode Island an action was brought upon a note given in Connecticut where the transaction occurred on a Sunday between the parties. It was held that as the transaction occurred after sunset on Sunday, and this was not prohibited in Connecticut, although different in Rhode Island, the action could be maintained in Rhode Island. (*Brown v. Browning*, 15 Rhode Island, 422.)

3. In an action for injuries sustained on a Sunday through the negligence of a city in not keeping the street in a safe con-

dition, it was held unnecessary for the plaintiff to prove that he was engaged at the time of his injury in a work of necessity to him. (*Black v. Lewiston*, 13 Pac., 80.)

4. It was held in Montana that in so far as the statutes permit in certain specified cases a summons to be served on Sunday that precluded the idea of allowing service on that day in any other case. (*Hauswirth v. Sullivan*, 6 Montana, 203.)

Warehousemen.—The law authorizing the carrying on of public warehousing varies with the statute of the respective states.

1. Owners of grain are estopped from asserting their title as against innocent third persons where they knew that their grain was commingled with the grain of other people in a common elevator, and from there sold from the common mass by the elevator company to any purchaser. (*Preston v. Witherspoon*, 109 Indiana, 457.)

2. An excellent illustration of the law of negligence applicable to warehousemen is that of a trunk having been returned with the contents to its owner in such a condition as to suggest that water was allowed to have caused the condition of things. The court decided that in the absence of all explanation on the part of the warehouseman as to how the trunk and contents were in such condition it was clear that ordinary care had not been exercised, and that the owner could recover for the injury or loss he had sustained. (*Reed v. Crowe*, 13 Daly, 164.)

MORTGAGE.

General Remarks.—In Illinois a mortgage need not be acknowledged to be valid as between the mortgagor and the mortgagee. It is better to have it acknowledged before delivery. (*Roane v. Baker*, 120 Illinois, 308.)

A note, or in some states a bond, is given to represent the debt, while the mortgage constitutes the security. It is quite common for the inexperienced to consider the mortgage only and as constituting the instrument to be both the debt and the security. In some of the large cities in the United States the business of loaning money on real estate secured by a

mortgage is of great magnitude. The same attention and care should be bestowed in searching the title to the security (the land) as one does on a purchase of real estate.

Any deceit or wrongful inducement exercised in procuring a mortgage or the execution of a party in the making of a mortgage, is enough to have it declared no mortgage.

Mortgages made contrary to the statutes of any state are void.

Mortgages expressing on the face or in terms a rate of interest higher than the legal rate, are voidable.

Deeds if they contain a clause or clauses which indicate that they were executed in the nature of security for debt, are treated in equity as mortgages, although in form they may appear absolute.

A mortgagee cannot enter upon possession of the land mortgaged until such time as the conditions therein contained have been violated, and the instrument or the law of the statute then granted such right of entry.

A mortgagee in possession must account for the rents, issues, profits, crops, etc., received or realized, or apply the same to the payment of interest and principal.

Mortgages are assignable and negotiable instruments. An assignment of a mortgage should be recorded as promptly as the mortgage itself. The question of priority of mortgages is often an important one upon a foreclosure of a mortgage.

The difference in *assuming the payment* of a mortgage existing at the time of purchasing the real estate and *taking the real estate subject to the existing mortgage* is often disregarded by the purchaser.

The payment or release of a mortgage should be attended to with the same care and accuracy as in the drawing, executing and recording of the original mortgage itself.

Effect of Recording Assignment of.—B., the plaintiff, became the owner of a mortgage three years after C., the defendant, purchased the property subject to the same mortgage now owned by B. C. not knowing that B. owned the mortgage, paid interest to T., a former owner of the same. B., however,

had authorized T. to collect the interest due thereon but not the principal.

B. brought an action against C. to recover amount due on said mortgage. C. set up for his defense that he had paid T. not knowing of B.'s owning the mortgage.

C. was not protected in paying T. by statute as to recording of an assignment of a mortgage, who was not authorized to receive payments upon the principal.

C. quoted Jones on Mortgages, § 791, that the recording of the assignment was not sufficient notice to him, C., to relieve B., the owner, from responsibility if C. made payments to a former owner of the mortgage. This is in direct conflict with the established principle of law that the assignment of a mortgage is a conveyance within the meaning of the recording act. (See 66 New York, 77; 79 New York, 23, 25; 87 New York, 446.)

C. purchases the property after T. sold the mortgage which was recorded. C. was therefore chargeable with notice of the sale of the mortgage. Such a record is constructive notice to all persons of the rights of the purchaser of the mortgage. (82 New York, 32.)

By the record B. was protected as to his claim, and C. received notice of the assignment of the mortgage. (*Brewster v. Carnes*, 103 New York, 556.)

CHATTEL.

A Minor's Chattel Mortgage Voidable.—Where a minor gives a mortgage on his personal property, for borrowed money, without delivering possession, and possession is afterwards taken without his consent, the mortgage is voidable at any time during his minority, and upon disaffirming the contract he can recover back the property without returning or offering to return the money. This has been so held in Minnesota (16 Minn., 402;) in Illinois (61 Ill., 177;) in New York (49 N. Y., 412;) in Alabama (26 Ala., 452;) and in Massachusetts (110 Mass., 399.)

Continued Possession of Mortgagor, with Power to Sell and Replenish Stock.—***Void as to Creditors, even though Recorded.***
—The Texas Supreme Court, in the case of *Peiser v. Peticolas*,

(1879,) said that "the principal question necessary for the decision of this case involves the legal effect, as to third parties, of a mortgage upon a stock of goods where the mortgagor retains possession and, with the knowledge and consent of the mortgagee, sells them in the usual course of trade and applies the proceeds to replenish the stock and not to the payment of the debts. * * * It is held in *Robinson v. Elliott*, (United States Supreme Court, 22 Wall., 513,) and by numerous well considered decisions of the State Courts, that the retention of possession of a stock of goods by a mortgagor, though the instrument be recorded, with power in him to sell the same in the usual course of trade, without applying the proceeds to the mortgage debt, but to substitute other goods, is fraudulent in law without regard to the good faith in fact of the transaction."

Progeny of Mortgaged Animals.—Priority of Liens.—For money borrowed one Gleim gave Paul a chattel mortgage, which was duly filed, on certain personal property, including "six milch cows" in Gleim's possession on his farm. Four of the animals were then with calf, and dropped their calves in April, two months or so thereafter. Gleim was previous to this last event indebted to one Funk, and the following October gave him a chattel mortgage, including in the mortgaged property the four calves mentioned. Gleim remained in possession of all the mortgaged chattels until the next spring, having meanwhile executed other chattel mortgages, and finally absconded. The property was sold for the benefit of all the mortgagees, by Paul, who acted as treasurer of the fund. The question was, who was entitled to the proceeds of the four calves, amounting to \$66, Paul or Funk?

A. The Circuit Court answered this question by awarding the proceeds to Paul, the first mortgagee. The Supreme Court of Wisconsin affirmed this judgment. The process of coming to this conclusion is interesting. The Court said—"Had the defendant (Paul) upon obtaining his mortgage, taken possession of the cows, and retained them, and the calves, when dropped, until after the plaintiff (Funk) had obtained his mortgage, then he undoubtedly could have held

them as against the plaintiff. By reason of such possession, the plaintiff and the world would have been conclusively presumed to know the defendant's interest in and right to the calves. Our statute authorizes the filing of the mortgage in lieu of such possession, and as equivalent to it. Such filing is constructive notice to third parties, subsequently dealing with the property, as to the rights and interests of the mortgagee in the property mortgaged."

This doctrine of notice, however, the Court thought applicable only so long as the calves were following the cows for nurture. They having been dropped in April and the second mortgage given in October, the period of nurture was held to have been passed, and the second mortgagee not affected with notice that they were covered by the prior mortgagee. The result so far, therefore, was to give the proceeds of the calves to Funk. But at this point another limitation was introduced. The Court said—"In the case before us the period of nurture had passed, and the calves were kept by the mortgagor in a field separated from the cows, so that a *bona fide* purchaser or mortgagee without notice would have been protected. Was the plaintiff (Funk) such a mortgagee? He took the mortgage to secure an indebtedness incurred many months before, and not yet due, and without any new consideration. The mortgage, though requested, was purely voluntary, and gave the mortgagee no greater right or interest in the calves than the mortgagee possessed." (Funk v. Paul, 24 North-Western Reporter, 419.)

Insufficient Description of Mortgaged Chattels.—Mortgage Rendered Void.—In a mortgage of personal property the description should be such as to identify the particular articles, as nearly as possible. Here is an example of a failure to observe this rule. "The following described personal estate lying and being in the county of Madison, state of Mississippi, to wit: Thirty head of cattle, six oxen, three horses, two mules, three wagons, fifty hogs; also all the crop of cotton, corn, fodder and potatoes, and all other produce which may be raised on the O'Reilly place in said county." A creditor of the mortgagor levied on the cattle, horses and mules, claiming

that as to them the mortgage was void on account of the insufficiency of the description. The Supreme Court held the creditor to be in the right, and threw out the annexed hints for the guidance of future givers and takers of chattel mortgages. They are as likely to be of service in other states than Mississippi, and may be safely heeded every where. The Court said:

“While it is true that it is difficult, if not impossible, to describe in a mortgage this species of property, so as to determine with certainty whether any particular property of that class is that embraced in the mortgage without a resort to evidence *aliunde*, yet the mortgage must mention some fact or circumstance connected with the property which will serve to distinguish it from all other property of the same kind. This fact or circumstance must be stated in the mortgage itself—it cannot be proven by parol evidence without thereby adding to the mortgage a term not contained in it. When thus stated its existence in connection with the property may be established by extrinsic evidence.”

The Court then proceeds to suggest how greater particularity in the description under consideration could have been obtained, saying—“The fact of the ownership or locality of the property, or some other mark which would serve to separate and distinguish it from other property, should have been mentioned in the mortgage; thus, if the mortgage had been written ‘*my* stock of cattle, consisting of about thirty head, *my* two mules, and *my* two horses,’ etc.; or ‘the stock of cattle on the O’Reilly place, consisting of thirty head,’ etc., it would have been sufficient, *provided* the stock of cattle, mules and horses did not exceed the number stated; or if the mortgage indicated an intent to convey the whole stock, or all the horses and mules without reference to the number.” The importance of the proviso contained in the last sentences is emphasized by the following: “When a precise number is conveyed and there is in fact a greater number, and there is no intention manifested to include the whole, there would be a failure to identify the particular animals conveyed, and the deed would be void for want of a proper description.” (Kelly v. Reid, Mississippi Supreme Court, October, 1879).

Transfers or Liens in Fraud of Creditors.—Sale of Stock in Trade.—Unless there is Visible Change of Possession, there is a Presumption of Fraud.—Jacob Lew, a tin, hardware and stove merchant, was indebted to Gideon W. Seavey and Morgan & Beach, and being embarrassed and unable to pay, executed a bill of sale of all his goods, notes, accounts, and a wagon and team, for the expressed consideration of \$1,000, to be applied on his indebtedness to the parties named. The instrument was not recorded. It was agreed, but not in writing, that Lew should continue in possession, carry on the business as before, and account to Seavey and Morgan & Beach for the moneys realized. It seems that Lew was to receive for his services a commission of ten per cent on sales and collections. The business was thus carried on from June 23d till August 28th, when he executed a chattel mortgage on the property remaining in his possession to Leonard S. Walker and several others, to secure debts contracted, with one slight exception, prior to the bill of sale. A few days afterwards they began a suit to foreclose this mortgage, at the same time asking the Court to enjoin Seavey and Morgan & Beach from interfering or intermeddling with the mortgaged property. The controlling question was upon the nature, good faith, and validity of the alleged sale and transfer of the mortgaged property to Seavey and Morgan & Beach. After referring to the provision of the Indiana Revised Statutes, nearly identical with the statute of frauds as generally existing on the statute-books of the other states, applicable to a sale of goods without a visible change of possession, the Indiana Supreme Court went on to say that it was “incumbent on Seavey to remove the presumption of fraud which resulted from Lew’s continuance in possession of the property in controversy after its sale and transfer as already stated. On that branch of the case the evidence was conflicting. Seavey proved the existence and validity of his debt against Lew, also the same as to the debt held by Morgan & Beach. There was also evidence tending to prove that at the time he, Seavey, purchased the property he did not know that Lew owed any other debts, and that when Walker and his co-mortgagees took the chattel mortgage they had full notice of

Seavey's and his associate's claim of title under their purchase from Lew. On the other hand, there was evidence tending to show that the circumstances connected with the alleged purchase by Seavey and his associates were unusual in such transactions; that no invoice of the property was taken, or itemized estimate of its value made; that the property was really worth more than \$2,000; that the agreed amount of the purchase money was never entered as a credit on the debts due Seavey and his associates respectively, but these parties continued to hold these debts as an unsatisfied indebtedness against Lew; that Seavey and his associates, as well as Lew, from the first had treated the alleged purchase of the property as a mere security for the payment of such indebtedness, and hence not an absolute sale within the proper meaning of that phrase. * * * * *

While Seavey was on the stand as a witness in his own behalf, it was proposed to prove by him that, before the execution of the chattel mortgage, he had taken the goods and chattels in suit out of the possession of Lew, and had placed them in the possession and under the control of a man who was then, and for several months at least had been, in the employment of Lew in the management of his business, but the proposed evidence was excluded in the lower court, and its exclusion appeared by the appellate tribunal, first, on a technical ground, and second, because, in the state of the evidence as it then existed, the proposed proof would have been immaterial. It had already been fully established that there had been no visible change of the possession of the goods and chattels following their alleged purchase by Seavey and his associates; that Lew, with the assistance of his employee in question, had continued in actual possession until after the execution of the chattel mortgage to Walker and his associates. Under such circumstances, an authority conferred on the employee to take possession and control of the goods and chattels would not have amounted to more than a constructive change of possession, which was not a sufficient compliance with the statute."

The judgment of the lower court in favor of Walker and his associates was therefore affirmed. (*Seavey v. Walker*, 6 Western Reporter, 271, 1886.)

Notes Secured by Mortgage.—The Separate Holders of Three Notes Secured by the Same Mortgage, will take the Proceeds in Succession, and not *pro rata*, the Original Mortgagee Coming in Last.—Stephen W. Pangburn executed and delivered to the North-Western Manufacturing & Car Company, three promissory notes falling due respectively November 1, 1882, November 1, 1883, and November 1, 1884. He subsequently executed a chattel mortgage to secure the notes. The company retained the note first to become due; assigned the one falling due November 1, 1883, to the Watertown Steam-Engine Company, and that falling due November 1, 1884, to Parkhurst and another. The whole property mortgaged was insufficient in value to pay the three notes, or any two of them. The question was, which of the note-holders had the prior right to the proceeds of the mortgage, or in what proportion the proceeds should be divided.

“It is settled in Indiana,” said the Supreme Court of that State, in passing upon the proper appropriation of the fund, “that the assignment of one or more notes made to the same person and secured by a mortgage, operates as an assignment *pro tanto* of the mortgage, and that the holders of the several notes have priority of lien in the order in which their respective demands become due.” Authorities were also cited, consisting of decisions in Indiana, New York, Massachusetts, Vermont, Louisiana, Kansas, and Ohio, to the effect “that an indorsee of a part of such notes so secured by mortgage is entitled in equity to payment out of the mortgaged fund, in preference to the notes retained by the mortgagee and assignor, although the notes so assigned may fall due subsequently to those retained by the mortgagee.”

The division sanctioned by the Court therefore was as follows: The note falling due November 1, 1883, to be first wholly paid and satisfied, and the residue, if any, to be applied on the note falling due November 1, 1884, nothing remaining towards payment of the note first due, the latter remaining in the hands of the assignor. The only fault found by the holders of the note last falling due was that they were not allowed to share *pro rata* with the note second to mature. This objection was met as follows:

“Equity says to the mortgagee and assignor in such a case, that having assigned the notes subsequently becoming due, he shall not enforce his prior lien as against his assignees holding the subsequent liens. But that postponement does not change the priority of the liens held by the assignees, nor in any way change the relation of those liens to each other. In such a case the subsequent liens will be adjusted as though there had been no prior lien in favor of the mortgagee. That is, the notes held by the assignees will have preference according to the date of their maturity.” (*Parkhurst v. Watertown Steam-Engine Co.*, 6 Western Reporter, 264, 1866.)

Preference of Chattel Mortgages.—One Given for a Previous Debt will not Displace a Prior Unrecorded Mortgage.—Judgment or Attachment Creditor only can Impeach the Good Faith of Previous Lien.—Second Mortgagee for Previous Indebtedness not an Incumbrancer in Good Faith.—Freedman Brothers & Co., of Detroit, were buyers of goods from Bates, Reed & Cooley, of New York city, and on February 7, 1881, executed a mortgage to the latter upon their goods, wares, merchandise and other personal property contained in their stores at Detroit as well as upon all future additions to or substitutions for such goods and merchandise, and their book accounts, notes and securities, for the purpose of securing both their past indebtedness to Bates, Reed & Cooley, amounting to \$45,000, for merchandise sold and money loaned, and any future liabilities which might be incurred by the mortgagors for other goods purchased, or other moneys borrowed from the mortgagees. No new indebtedness was created at the time the mortgage was executed. Before this mortgage was lodged for record in the proper office at Detroit, Freedman Brothers & Co. made another mortgage covering the same stock of goods, dated February 11, 1881, to the People's Savings Bank of Detroit, to secure certain demand notes, \$49,000 in amount, which were executed by that firm on the 7th of the same month, and also “all other paper indorsed by it” and held by the bank. The second mortgage provided that Leopold Freund, as agent for the bank, should take immediate possession and sell the goods in the ordinary

course of business, applying the proceeds to the said indebtedness until the same was paid. The demand notes in question were given in substitution for other paper of the mortgagors then outstanding, and consequently represented past indebtedness. Each demand note was accompanied by a cognovit, or confession of judgment, under which, however, no action was taken. The bank mortgage was the first filed for record, though it was not lodged until the bank had notice through its agent that Bates, Reed & Cooley claimed to be in possession of or to have right in the mortgaged property. It does not clearly appear whether the bank had actual notice that a prior mortgage had been executed.

By the statutes of Michigan, as in the states generally, it is provided that "every mortgage or conveyance intended to operate as a mortgage of goods and chattels, which shall hereafter be made, which shall not be accompanied by an immediate delivery and followed by an actual and continued change of possession of the things mortgaged shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith," unless the mortgage shall be duly filed in the office of the township or city clerk, or recorder, where the mortgagor resides, or in the case of a non-resident, where the property is.

Both mortgagors claimed to be in possession of the mortgaged stock, the bank dating theirs from the 11th of February, and Bates, Reed & Cooley denying that the bank ever had such possession as the law requires, setting up their own possession from the 15th. In the opinion of the Supreme Court "the claim of neither party in that respect was satisfactorily sustained by the proof. The evidence does not show such open, visible and substantial change of possession as the law required in order to give notice to the public of a change of ownership. In a sense only," said the Court, "both parties were in possession by agents early in the morning of the 15th of February, each claiming the exclusive right to manage and control the property under the terms of the respective mortgages." Such a position, of course, rendered a temporary truce, or compromise necessary, each contestant reserving all his rights.

“It is contended,” says Justice Harlan, “that the mortgage to Bates, Reed & Cooley was fraudulent as against subsequent creditors and mortgagees in good faith, in that the mortgagees contemplated that the mortgagors should remain in possession and prosecute the business in the ordinary mode. The mortgage of February 7, 1881, certainly contains no provision of that kind. But if the extrinsic evidence establishes that such a course upon the part of Freedman Brothers & Co. was, in fact, contemplated by Bates, Reed & Cooley, it would only show that the mortgagees were willing to give the mortgagors an opportunity to avoid a suspension of their business and bankruptcy—the additions to the stock in trade being bought under the mortgage, so as to compensate the mortgagees for any diminution in value by reason of goods disposed of in the usual course of business. If the mortgage had, in terms, made provision for such a course upon the part of the mortgagors, as the bank contends was in the contemplation of the mortgagees, it would not be held, as matter of law, to be absolutely void or fraudulent as to other creditors. The good faith of such transactions, where they are not void upon their face, is, under the statutes of Michigan, a question of fact for the determination of the jury. That rule does not, however, restrict the power of the court to give to the jury a peremptory instruction, covering such an issue, when the evidence is all on one side, or so overwhelmingly on one side, as to leave no room to doubt what the fact is. In this case there is an entire absence of any evidence impeaching the good faith of Bates, Reed & Cooley in procuring the mortgage of February 7, 1881. There is nothing whatever to show that they had any purpose to commit a fraud or to put their mortgagors in such a position that the latter could more readily deceive or defraud other creditors.”

The important point was next made, that the bank in its capacity as a creditor at large, was not entitled to attack the mortgage as fraudulent upon the grounds stated. This the bank could do only after it had reduced its claim into the form of a judgment or an attachment. The contention that the bank's position as a second mortgagee in possession dispensed with the necessity of its becoming a judgment or attachment creditor, was rejected by the Court.

This, it was said, disposes of all the material questions in the case preliminary to the main inquiry whether the bank—the mortgage to it having been really given to secure past indebtedness of the mortgagors—is, in the meaning of the statute, a subsequent “mortgagee in good faith.” If not, the mere filing of the mortgage of February 11, 1881, before that of February 7, 1881, did not give it priority of right over Bates, Reed & Cooley, and the mortgage that was in fact first executed and delivered must be held to give priority of right.

The question thus stated is examined at considerable length, and the conclusion is embodied in the following sentences:

We are of opinion that the claim of the bank to be a subsequent mortgagee in good faith cannot be sustained, because the mortgage of February 11, 1881, although first filed, was not given in consideration of its having surrendered, or agreed to surrender, or to postpone the exercise of any substantial right it had against the mortgagors, but merely as collateral security for past indebtedness. Under such circumstances, the mortgage which was prior in time confers a superior right.

The judgment of the Circuit Court in favor of Bates, Reed & Cooley was accordingly affirmed. (*People's Savings Bank and Leopold Freund v. Bates et al.* March 7, 1887.)

Consideration of Mortgage Affecting Priority.—When First Record of Second will Prevail.—It seems that under New York decisions a second mortgage recorded before one previously executed will not deprive the first of its priority, unless it is made for some new consideration advanced at the time, and that a mortgage for a pre-existing indebtedness is not protected by a prior record against a non-recorded mortgage for value. This was stated in a narrative way as the New York rule, by Judge Field, of the United States Supreme Court, in denying a motion for re-argument in a case where the New York doctrine was overthrown.

The facts were that one Whitney made a mortgage to a bank to secure a present and future indebtedness. It was suffered to lie unrecorded for a number of months, and the

indebtedness then existing was paid off. Later, additional mortgages were executed, one of which was to secure then existing indebtedness to McC. and future obligations. McC.'s mortgage was recorded before the bank's. Foreclosure was made under a mortgage prior to all these, and the question was, who was entitled to the surplus?

The United States Supreme Court held that McC. was first entitled. Incidentally the Court passed upon the validity of a mortgage to a national bank to secure future advances, saying it was not an open one in that Court, such mortgages having been held valid in the case of *National Bank v. Mathews*, 98 United States, 621. On the main point it was said:

"When the McCormick mortgage was executed the indebtedness to the bank was paid, and his mortgage remained in force only for any future indebtedness which he might incur. For such future indebtedness it could not cut out the mortgage to McCormick, executed for an existing indebtedness, and of which mortgage the bank had notice. For advances afterwards made, the mortgage to the bank was a subsequent incumbrance. As between the two mortgages—one for a past indebtedness, and one for an indebtedness to be subsequently incurred—the one for the past indebtedness must have precedence, if first recorded." (*National Bank v. Whitney*, 103 United States, 99.)

It is worth while to call attention to the fact that McC. took his mortgage without notice of the bank's. The claim of B., who held another mortgage on the same property under exactly the same circumstances as McC., except that he had notice of the bank mortgage, was postponed until the satisfaction of the latter.

NEGLIGENCE.

Remarks.—The question of negligence depends, to a great extent, upon the relation existing between the parties; the one causing a loss or injury, and the other sustaining a loss or injury, as; between landlord and tenant, master and servant, carriers, agents, attorneys, physicians, executors, etc.

The care to be exercised and the question whether one has been negligent in performing or omitting to perform, a duty, are eminently matters to be determined by a jury. So likewise the question of contributory negligence on the part of the person claiming to have sustained a loss or an injury.

Accidents occurring by leaving excavations, gratings over sidewalks uncovered or unguarded, or left in an insecure manner, the determining of the cause of the injury and the matter of a duty to have been performed, depend on the facts in each particular case.

The question often arises as to whom to sue for an injury sustained, the owner of the premises, the contractor or subcontractor engaged in erecting or repairing or performing some work or managing the same.

The question of what is negligence or contributory negligence is often one of law, but the facts are to be found by the jury. The jury should be instructed by the court as to the law governing the case upon the evidence adduced, while the question of damages for the loss or injury sustained is purely one for the jury to pass upon. The verdict is seldom set aside as to the amount of damages found by the jury where it is clearly not against the weight of the evidence or the evidence itself, or that the jury did not act from passion, prejudice, corruption, or unaccountable caprice.

The courts in all states are crowded with the trials of "damage" and "accident" suits, or "negligence" cases".

Delay in Enforcing Claims.—The doctrine that a state claim cannot be enforced in equity when plaintiff's delay has deprived defendants of the means of defense was well applied in *McCartin v. Traphagen*, (10 Central Reporter, 193) an action in which the beneficiaries under the will of a decedent sought, after a great lapse of time, to charge surviving executors and the representatives of the deceased executor with a breach of trust. Vice-Chancellor Van Vleet well said: "Great delay is a good bar in equity. Courts of Equity have from the earliest times, upon general principles of their own, even where there was no analogous statutable bar, refused relief to state demands." More than one hundred years ago, Lord

Camden said: "A Court of Equity, which is never active in relief against conscience or the public convenience, has always refused its aid to state demands, where the party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth the activity of a Court of Equity but conscience, good faith and reasonable diligence. Where these are wanting the court is passive and does nothing. Lacks and neglect are always discountenanced; and therefore from the beginning of this jurisdiction there was always a limitation to suits in equity." (Smith v. Clay, reported in a note to Deloraine v. Browne, 3 Bro., C. C., 640.)

Erroneous Report by Mercantile Agency.—Loss by Reliance Thereupon not Recoverable.—Contract Against Negligence of Agents.—Duncan, Hall & Co. complained of Dun, Barlow & Co., charging gross negligence in ascertaining the financial standing and responsibility of James Hill. As stated in the opinion of Judge Butler, United States Circuit Court, eastern district of Pennsylvania, the facts were as follows: "Mr. Hill resided in Pittston, Luzerne County. The evidence shows an application by the plaintiffs to the defendants' agents at Williamsport for information respecting the financial standing of this gentleman; that they received an answer saying he had a business capital of \$4,000, and real estate worth \$10,000 clear of incumbrances; that the inquiry was repeated at the defendants' Philadelphia office and a similar answer received; that the plaintiffs, relying upon this information, sold goods to Hill, to a large amount, on account of which a balance of \$3,000 remains unpaid and cannot be collected, Hill having failed; that the information furnished was incorrect, the real estate owned by Hill being incumbered at the time beyond its value. Upon this statement," continued the Court, "it may be admitted that the plaintiffs would be entitled to recover, but for the provisions contained in the second and fourth paragraphs of the contract; the former of which stipulates that the agents, in gathering information, shall be regarded as the plaintiffs' representatives; and the latter, that the defendants 'shall not be responsible for any loss caused by the neglect of said agents, attorneys, clerks, or

employees in procuring, collecting and communicating the said information.' The language in this latter paragraph of itself is broad enough to exempt the defendants from liability for all negligence of such agents. The plaintiffs think it should apply only to ordinary negligence, and be read as if gross negligence was expressly excepted. For this we can find no warrant. The defendants' business required the employment of numerous agents, and it was foreseen that they might, in some instances, prove negligent and unfaithful. The defendants were particular in calling attention to this, and in guarding themselves against the danger of loss therefrom; and no reason can be seen why they should be less anxious for protection against gross than against common negligence from this source. * * * * * The contract which these parties entered into must be enforced as they made it. It may have been unwise, but with that we have nothing to do. One or the other must bear the risk involved in depending upon agents scattered over the country, of whom neither could know much. The plaintiffs agreed to bear it, and they must take the consequences." (Duncan v. Dun, 8 North-Eastern Reporter, 299.)

A Trader is Bound to Maintain in a Reasonably Safe Condition the Approaches to his Premises which are Intended for the Use of his Customers.—Nave and another were grain buyers, and had scales and a warehouse where they received, weighed and stored the grain. The driveway by which these points were reached was narrow, dark, with a low ceiling overhead, and at one part of it there was a rise, making the space between the floor and ceiling still less. This change in the level was not easily discoverable, owing to the darkness. Flock brought to the warehouse a two-horse wagon loaded with corn, and was directed by employees of the warehousemen to drive along this passage-way for the purpose of unloading. In following such direction he failed to notice the change of grade, and in consequence was caught between the timbers of the ceiling and seriously injured. Question—was there such negligence on the part of the warehouse occupants as to render them liable in damages?

In the opinion of the Supreme Court there was. The following instruction to the jury was asked for: "If the jury find from the evidence that the place where the plaintiff received the injury he complains of had been used by the defendants for many years as a driveway to receive wagonloads of corn containing as large and larger quantities of corn than the load on which plaintiff was hurt, and that several hundred thousands of bushels of corn had been hauled into the defendants' warehouse through said driveway and nobody was injured, and that no complaint had ever been made to defendants, nor had they ever heard of said driveway being called of not sufficient height by anybody, nor had notice thereof, and plaintiff was hurt in said driveway in the manner he complains of in his complaint, by accident, then the plaintiff cannot recover." The Supreme Court ruled that this instruction was rightly refused, and in another place said—"The ruling question was, whether the place was in truth dangerous, and if it was shown to be so, then the fact that others had used it in safety would not change its character, nor deprive the appellee of his right to redress." The general principle was stated thus: "A man who invites others to deal with him, and provides a place where persons may deliver articles bought by him, is bound to use reasonable care to make and keep the approach to such place in a reasonably safe condition for use for the purposes for which it was intended." (Nave v. Flock, 90 Indiana, 205.)

The Occupier, and not the Landlord, of a Building is Liable for Injuries Caused by an Unsafe Approach.—Morrill was the owner of a building which was rented to another, who occupied it as a dwelling and meat-market. The path from the street to the front door was unsafe, and Mrs. Mellen and her daughter, in going to the house at night for the purpose of visiting the tenant, fell down an embankment and received injuries. The dangerous condition of the path was known to the owner, and existed previous to the lease of the premises. The question was, whether the owner was liable for the injuries thus occasioned?

It was held by the Massachusetts Supreme Court that he was not. (*Mellen v. Morrill*, 126 Mass.) “Mrs. Mellen,” said the Court, “can hold the defendant liable only on the ground that he was guilty of negligence towards her. The occupier of a building who negligently permits the building or the access to it to be in an unsafe condition is liable for an injury occasioned thereby to a person whom he, by an invitation express or implied, induces to enter upon it. * * * * But the defendant was not the occupier of the land, and did not expressly or impliedly invite the plaintiff to enter upon it. He had leased it to a tenant. The fact that the walk was in the same condition before the devise is not material. The tenant alone had the right to determine the purposes for which he would use the premises. If he used them so as to impliedly invite people to visit them in the night, it was his duty to make them safe by a railing or a light, or other warning. It was not the duty of the landlord, and indeed he could not have the right, without the consent of the tenant, to do this.”

NOTES.

Notes made in one state, payable there at a national bank, and sent to one in another state, that the law of the state where it was made should control.

The question of negotiability of a promissory note is determined by the fact of the absolute and unconditional liability of the maker on the face of it to pay a fixed sum of money.

Effect of Form and Contents, Signature, Description of Parties, Execution, Delivery, Consideration, Ownership, etc.

1. Where a note or writing is given promising to pay a certain sum of money upon the completion of certain work, it was held not to be a promissory note, and that no recovery could be had upon it until the work agreed to be performed was shown to have been so done. (*Chandler v. Carey*, 31 North-Western Reporter, 309.)

2. A. delivered an instrument, “June 1, 188—. Due B. \$— value received, with interest at — per cent per annum after

four months from date." This was a promissory note, due and payable at the time of its execution. (*Lee v. Balcom*, 9 Colorado, 216.)

3. A promissory note, "On demand after date, we promise to pay," etc., was signed by L. with his name, and "Treasr. H— Gas Light Co." added thereto. This was held to be a note made individually by L. (*McClure v. Livermore*, 78 Maine, 390.)

4. "One year after date we promise to pay to the order of — at our office," etc., and was signed "H— Flour Mills Co., D. P. S—, President." This was the separate note or obligation of the company, and not the joint one of the company and S—. (*Latham v. H— Flour Mills*, 68 Texas, 127.)

5. Where there is nothing in the body of the note to indicate the capacity in which the maker of the note acts, that the mere adding to the signature the office or capacity will not prevent a personal liability thereon of the maker. (*Coburn v. Omega Lodge*, 71 Iowa, 581.)

6. "In an action on a promissory note, by the payee against the maker, evidence is admissible that the note was delivered by defendant to plaintiff upon the condition that it was to be delivered up to defendant if demanded on a subsequent day, and that he demanded its return from defendant on that day." (*McFarland v. Sikes*, 54 Connecticut, 250.)

7. "A promissory note was executed on Sunday, but was not to be delivered, and was not in fact delivered until Monday. *Held*, that the contract was made on Monday." (*Bell v. Mahin*, 69 Iowa, 408.)

8. "Plaintiff holding a check on a bank, surrendered it and took the bank's note for the amount, together with the notes executed by defendant as collateral security for the payment of the same. The note of the bank was not paid, and suit was brought on defendant's notes. *Held*, that the extension of time on the check, by the substitution of the note, was sufficient consideration for the collaterals sued on." (5 Central Reporter, 452.)

9. "A discharged bankrupt gave his promissory note in payment of an indebtedness from which he was released by

his discharge in bankruptcy. *Held*, that the moral obligation to pay the debt formed a sufficient consideration for the note." (Wislizenus v. O'Fallon, 91 Missouri, 184.)

10. "Possession of a negotiable promissory note, not so restricted by indorsement but that it may pass by delivery, is evidence of ownership." (7 New York State Reporter, 326.)

11. "But there is no presumption that the holder of commercial paper payable to order, unindorsed, has any title to the same, whatever the presumption may be where genuine indorsements are established." (Citizens' National Bank v. Importers', etc., National Bank, 9 New York State Reporter, 201.)

Neglect to Sue Principal, and Extension of Time, no Release of Surety.—F. and another made a promissory note payable to Smith. F. was allowed to prove on suit brought that he signed it without consideration, assurety. He also offered to show that at the time the note became due the maker was solvent, and able to pay it; and that F. insisted on Smith's collecting it by suit against the maker. Instead of doing so, Smith gave the maker further time in which to pay the note, and told F. to rest easy; that he would not look to him; that the principal was good enough, and that he would trust the latter for payment. Was this extension of time without F.'s consent, and promise to look only to the principal for payment, sufficient to release F.?

The tenor of an answer to this question depends upon the state to which it is intended to apply. In Montana, for example, it was held in the case described, that F. was not released. The extension of time for payment was held not to discharge him, because the Court said, "it does not seem to have been extended for any definite period, or upon any consideration." As to the neglect to sue the principal debtor on the surety's request, it was said that "the payee or holder does not receive the note with an implied promise that he will exhaust his remedy against the principal before proceeding against the surety. The obligation of the surety is to pay according to the terms of his promise, and he may protect himself by paying and then proceeding against the principal,

and that is his remedy." In New York and Pennsylvania, the surety would have been held discharged, and in Alabama, Arkansas and Tennessee, the same rule has been introduced by statute. "There are indeed," observes the Montana Court, "*dicta* in some of the cases turning upon statutes approving the rule in *Pain v. Packard*," (the New York case, 13 Johns., 174). "But these cannot avail for the unsound doctrine against the strong and universal current of authority outside of the infected states." (*Smith v. Freyler*, 1 Pacific Reporter, 214, 1883.)

In Indiana, by statute, a surety may require the creditor by a notice in writing to bring suit, and if this be not done, and prosecuted to judgment and execution, the surety will be discharged.

In Iowa the statute provision on the subject, has been interpreted with painful strictness. (*Moore v. Peterson*, 64 Iowa, 424.) Harvey, in that case, was surety for Peterson, and gave a notice to the creditor in these words—"I again notify and request you to begin suit against W. H. Peterson for the collection of the amount due, for which I am his surety, or permit me to begin suit against him in your name at my cost." The Supreme Court held this notice insufficient, because it did not require suit to be brought against Harvey (the surety giving the notice,) as well as against Peterson, the principal, and said the form of the notice should have been to sue *on the contract*.

Promissory Note Intended as Testamentary Gift.—No Action to Collect it.—Revocable Until Paid.—Lillie Williams brought suit against the administrator of Delilah Deeds on the following instrument:

PLEASANT VALLEY, Ill., Oct. 25, 1875.

Whereas my niece, Lillie Williams, has performed for me personal service for a long period of time, for which I desire she shall receive ample compensation from my estate, and not feeling able, at present, to fully compensate her, I therefore and hereby acknowledge myself indebted to her in the sum of \$2,500, with interest, but not to be due until my death, unless at my option.

DELILAH DEEDS.

The Appellate Court for the Second District of Illinois, reversing a judgment of the circuit in favor of Lillie Williams, found as a matter of fact that the note was given without any consideration whatever; that it was a mere gift, intended

in the nature of a testamentary bequest, and consequently that it could not be collected out of Delilah Deeds' estate. The Supreme Court affirmed the judgment, saying—"A note executed without any other consideration than that of natural affection, or one without any valuable consideration, intended as a mere gift, cannot form the ground of recovery in an action at law. A gift is always revocable until it is executed, and a promissory note, intended purely as a gift, is but a promise to make a gift in the future. The gift is not executed until the note is paid." (*Williams v. Forbes*, 114 Illinois, 167.)

Conditions Destroying Negotiable Character.

\$3,000.

MARLBOROUGH, July 31, 1868.

Five years after date I promise to pay to the order of John F. Costello, three thousand dollars, payable with interest at six per cent value received. "Given as collateral security with agreement."

THOMAS COREY.

In an action to collect the above note, the defense was that Corey, then deceased, had performed the collateral agreement in his life-time; that the note was not negotiable, and therefore the holder took it subject to any equity or defense existing against the first taker, party to the executed agreement. The Massachusetts Supreme Court, after referring to the want of uniformity among authorities, whether by the general law merchant, the note in question would be deemed negotiable, went on to say that "in this commonwealth, however, it is settled by an uninterrupted series of decisions that any language put upon any portion of the face or back of a promissory note, which has relation to the subject-matter of the note, by the maker of it before delivery, is a part of the contract; and that if, by such language, payment of the amount is not necessarily to be made at all events, and of the full sum, in lawful money, and at a time certain to arrive, and subject to no contingency, the note is not negotiable. The words written upon the face of the note, 'given as collateral security with agreement,' being incorporated in and made a part of the contract, indicate with clearness that there may be a contingency, to wit, the performance of the undertaking to which this is collateral, in which it would not be payable, and so it lacks that element of negotiability which requires that at all

events, a sum certain shall be payable at a time certain." (Costello v. Crowell, (1879) 8 New England Reporter, 528.)

Stipulation to Pay Collection Expenses.—Whether Note Containing it is Negotiable.—In accepting a promissory note, or other instrument of the kind, the negotiability of which depends upon its promise to pay a fixed sum, it becomes important to remember the fact that there is a great conflict in the decisions in different states on this point, and that the law of the place of execution will govern the question, so far as concerns any particular instrument under consideration. The opposition was exhibited in the case of two notes executed in Kansas, payable in Missouri, and discounted before maturity by a bank in the latter State. The maker was sued in Kansas, and the United States Circuit Court for that district, in giving judgment, referred to the conflict of judicial opinion as follows:

"The Supreme Court of Kansas has decided that such notes are negotiable instruments. The Supreme Court of Missouri has decided that they were not negotiable instruments. * * * The law * * * really is the same in both States, for it is a part of the common law of the land, and this Court must base its opinion on that law. And it seems to me the only way the defendants can be relieved from liability would be to hold that under the commercial law of this country these contracts are not promissory notes, because not drawn for an amount certain, by reason of the provision for an attorney fee. And in support of that proposition there are several very respectable authorities," (citing decisions in Missouri, Pennsylvania and Illinois.) "On the other hand there are many equally respectable authorities," (citing decisions in Kentucky, Iowa, Indiana and Kansas.) "The reasoning upon which the Kentucky, Iowa and other cases following them rest their decisions appear to me to be correct, and the conclusion reached is more in accordance with the advanced views of the present time, and with the general principles established by the Supreme Court of the United States in *Mercer Co. v. Hackett*, 1 Wall., 95, and other cases sustaining the negotiability of municipal bonds." (*Howenstein v. Barnes*, (1879) 8 New England Reporter, 326.)

Place of Contract.—Good Note, though Invalid where Signed, if Valid where Delivered.—One Bell, living at Skowhegan, Maine, and holding an overdue note against Alvin Packard, of Cambridge, Mass., wrote a new note, dating it at Skowhegan, and sent it to Packard, asking him to execute it, with a good surety, and promising thereupon to surrender the old note. Packard's wife signed as surety, for accommodation, and the new note was mailed to Bell at Skowhegan. Such a contract by a married woman was good in Maine, but not in Massachusetts. She was sued in Maine, and the Supreme Court of that State held her bound, saying—"Our opinion is that the note was made and intended by the parties to be paid in Skowhegan. For although it was signed in Cambridge, it was delivered to the payee in Skowhegan; and it was not a completed contract until delivered." This conclusion was reinforced by the argument that the parties must be held to have intended making a valid contract, and this intention could be carried out only by construing it in accordance with the decision of the court. (*Bell v. Packard*, 69 Maine, 1879.)

Indorser Before Utterance is Joint Maker.—The holder of the following note brought suit against the indorser to charge him in the capacity of joint maker:

\$200.

EAST SAGINAW, April 22, 1872.

For value received I promise to pay Daniel Herbage or bearer the sum of two hundred dollars with ten per cent interest the 22d day of April, 1873.

Indorsed PATRICK McENTEE.

W. R. SCHENDALL.

The Supreme Court, in deciding the case, corrected the erroneous supposition of counsel, that while the indorser of non-negotiable paper, before it is uttered, becomes liable as joint maker, the indorser of negotiable paper is not so liable, and ruled, under Michigan decisions, that "on its face the paper now in question imported that for the purpose of adding to its credit the defendant at its inception gave his name as a promisor of payment, and made himself liable in the character of maker." In discussing the course of the New York courts on the question, it was suggested by the Supreme Court that "the distinction they assumed between negotiable and non-negotiable paper as a reason for applying

one rule to the former and another to the latter did not seem to be a sound distinction, and ought not to be adopted." (Herbage v. McEntee, 40 Michigan, 1879.)

Death of Indorser.—What is Valid Notice of Protest.—On the death of an indorser of a negotiable promissory note, an attempt was made to serve notice of protest on his administrators, and subsequently his heirs were sued. They resisted payment because they had not been served with notice. The New Jersey Supreme Court, however, denied their right to such notice, and said—"We are referred to no case holding notice to the heirs requisite, under any circumstances, to meet the condition put upon the holder. The full purpose is served when the personal representative is notified. Whatever protection or indemnity he may gain by resort to prior parties will, if the heirs are called upon, inure to them. A rule requiring the holder to notify the heirs and devisees would often be attended with great inconvenience and embarrassment to holders of commercial paper." The Court also said that if there be no executor or administrator, notice sent to the decedent's last place of residence is sufficient. (Smalley v. Wright, 11 Vroom.)

Negotiation after Expiration of Days of Grace.—Conditions Necessary to Constitute bona fide Holder.—A note made by Nelson & Ballen, dated at Chicago, March 6, 1883, payable ninety days after date, was bought by Joseph O. Glover, according to his own testimony under the following circumstances: He "agreed to take the note" on the 6th day of June, and took possession of it on that day; he had some conversation about the note on the 7th, and on the 8th gave his check in payment for it. It became due by the contract of the parties on the 4th of June, or with grace allowed by Illinois law, on the 7th. The question is, was Glover a *bona fide* holder of the note before maturity?

"There is grave doubt under the evidence," said the Illinois Supreme Court, "whether the plaintiff (Glover) can be considered a *bona fide* holder of the note before he paid for it, and that was after the expiration of the ninety days of grace." The following views were expressed :

“The doctrine on this subject is that the days of grace on negotiable paper constitute a part of the original contract, and that during such days the negotiability of such paper is unrestricted; so that a note payable in ninety days is in law payable in ninety-three days. It seems to be the settled commercial law that negotiable paper taken in the usual course of business on or before the expiration of the second day of grace is not negotiated after maturity; but whether it may be so taken on the third day, so as to protect the holder against any equities that may exist between the original parties, the authorities are in a measure conflicting. Perhaps the rule most generally observed is, if negotiable paper is taken in the usual course of business at any time before it is in fact dishonored, on the third day of grace, it will be regarded as having been negotiated before maturity, so as to afford the purchaser the usual protection against prior existing equities. In this case it should be made to appear that plaintiff purchased the note in good faith, in the usual course of business, before it became in fact dishonored by non-payment at maturity.”

The case was accordingly remanded for a new trial, in order to take evidence on these points. (*Johnson v. Glover*, 7 Western Reporter, 677.)

Peculiar Indorsements.—R. H. made a promissory note to his own order, and instead of the usual blank indorsement, wrote a certificate that he was worth a certain amount, and that the note was given in full of all demands to date of the Queen Fertilizer Company. Was the signature to this statement a sufficient indorsement to pass title to the note? The trial judge said no; there was merely a signed contract on the back of the note, but no indorsement. The Supreme Court of Pennsylvania, however, reversed this decision, and held, that the note was foolishly but sufficiently indorsed. (*Dunning v. Heller*, 16 Rep., 154, 1883.)

One of the authorities relied upon by the Court for its own conclusion, was an English case where the words, “I give this note to A. George Chaworth,” was held to be a good indorsement. (*Chaworth v. Beech*, 4 Ves., 555.)

Successive Accommodation Indorsers.—Oral Agreement to Divide Responsibility.—The question whether two accommodation indorsers in blank, can be shown to be joint and not successive indorsers, has been decided differently in different states. Of course, if the indorsements are considered by themselves, without explanation, the first indorser must stand in the gap alone, and this is the position to which he is consigned by the Supreme Court, in spite of his ability to show that there was an agreement contemporaneous with the signatures that the second indorser should bear half the loss. The note in question was made to the order of J. K. Johnson, for the accommodation of the makers, and indorsed first by the payee, and immediately after by John Ramsey. Johnson was obliged to pay it, and tried to collect half of the amount from Ramsey, on the ground that he indorsed at Ramsey's request, and upon his promise that he would pay half of any moneys which they might be obliged to disburse, in case the note was dishonored by the makers. The Supreme Court refused to permit the introduction of any evidence to show such an agreement, holding that the legal effect of the signatures as they appeared on the back of the note was to make the first indorser first liable to pay, without recourse to a subsequent indorser, and that the legal effect thus stated could not be altered by a verbal agreement. (*Johnson v. Ramsey*, 42 New Jersey Rep.)

In the New York case of *Phillips v. Preston*, 5 How., 278, the Court allowed the first indorser to prove a like verbal contract by the second indorser to share the loss, and the latter precedent has been followed in Massachusetts.

Position of Payee after Indorsement.—When not Joint Maker.—A promissory note made by L. payable to B. or order, was indorsed at date by B., and discounted the same day by L. at bank. The note having been dishonored at maturity, was protested, but too late to charge B. in the character of indorser. It was therefore insisted that as he had indorsed the note before its negotiation at the bank, for the sole purpose of enabling the maker to discount it, he became as to third parties joint maker, and not entitled to notice of protest. The Supreme Ct. held otherwise, and said :

“The payee, by signing his name on the back of the note becomes thereby an indorser, and can be held chargeable in no other capacity, unless he add apt and proper words to create a different relation. The fact that the payee signed his name on the back of this note at the same time that it was signed by the maker, for the purpose of enabling the latter to negotiate it, would not enlarge his liability or create any new relation between him and third parties who might afterwards become the holders thereof. It follows that a want of proper protest and notice thereof discharged him from all liability thereon.” (Smith v. Long, 40 Mich.)

Alteration of Instruments.—Addition of Immaterial Words to a Note.—A promissory note reading “*On demand* I promise to pay Mr. Edward Aldons the sum of £125,” was put in suit, the maker refusing to pay because the note had been altered, and the words “on demand” inserted. Judgment went against him, on the ground that, as all notes which express no time for payment are payable on demand, therefore the alteration was immaterial. (Aldons v. Cornwall, L. R. 3 Q. B., 543.)

An instance of material alteration was passed on in another English case, (Warrington v. Early, 2 E. & B., 763,) where a joint and several note signed by three persons was expressed to be payable “with lawful interest.” Two of the makers, in the absence of the third, added the words “at six per cent,” and the absent third party was held to be discharged by this alteration.

Maturity of Note During Epidemic.—Time of Demand and Protest.—A note executed by J. A. A., payable at the National Bank of Memphis, was due September 13, 1879, at which time yellow fever prevailed there, and the maker and indorser were both fugitives. The note was protested at maturity, and notice of protest left on the same day at the indorser’s usual place of business in Memphis. The epidemic was officially declared at an end on October 26. In a suit against both maker and indorser, the latter relied upon the Act of the Tennessee Legislature, Chapter 28, Acts of 1879, excusing the owners or holders of any negotiable paper from making

demand, giving notice or entering protest during the prevalence of an epidemic, and making it sufficient to do such acts within fifteen days after the epidemic shall have been declared at an end by the health authorities. The indorser contended that this extended the maturity of the note till the time mentioned, and that demand and protest previously made were before maturity, and therefore ineffective. The chancellor took the same view, but the Tennessee Supreme Court held the contrary, that the protest was timely and the indorser bound. The Court said:

“The common law excuses the non-protest of negotiable paper under like circumstances as those provided for by this Act, provided that the same is properly protested within a reasonable time after the same have terminated. But we are not aware of any case, nor have we been cited to any, where a protest actually made, and notice given or sent, as required by the general law, has been held to be invalid or inoperative to bind the indorser, nor is it contended that such is the case at common law. The statute in question is simply a re-enactment of the common law rule, with the exception that the statute fixes, by a definite event, the period of the termination of the epidemic, which, before its passage, was a matter of proof, and a fruitful source of contention, and also determines or fixes fifteen days after such termination as a reasonable time within which protest may be made.” (*Hanauer v. Anderson*, 16 Lea, 340.)

Indorsers Before Delivery Held as Joint Makers.—Obligations Under Other Circumstances.—Two notes were made by the Lockstitch Fence Company, in part payment of an indebtedness, to the Washburn & Moen Manufacturing Company, as payee. Before their delivery to the payee, the president of the first-named company was asked to guarantee the debt, and gave his indorsement on the back of the notes. The other officers also indorsed them. The notes were dishonored, and the indorsers were sued as joint makers with the Lockstitch Company. The payees being a Massachusetts corporation, and the makers citizens of Illinois, the suit was brought in the United States Circuit Court, northern

district of Illinois, and judgment rendered that all the indorsers were jointly liable as makers. In the opinion of the Court, in Illinois it appeared to be the established rule that "a blank indorsement by a third party, made under the circumstances heretofore stated, is *prima facie* evidence of a liability in the capacity of a guarantor." In New York and Wisconsin the rule was said to be that presumptively the persons making a blank indorsement on the back of a note before delivery stood in the relation of indorsers, but this presumption may be rebutted by evidence that the indorsement was made to give the maker credit with the payee. The Massachusetts rule was stated to be "that if a third person place his name in blank on the back of a note before its delivery to the payee, he is an original promisor;" and by citation of decisions it appeared that the Massachusetts rule prevailed in Maine, Missouri, Georgia, California and Vermont. The case of *Good v. Martin*, 95 United States, 90, was cited as settling the rule in the federal courts, and there, as the Court observed, it was distinctly held (1) that if a third person put his name in blank on the back of a note at the time it was made, and before it was indorsed by the payee, to give the maker credit with the payee, or if he participated in the consideration of the note, he must be considered as a joint maker; (2) but if his indorsement was subsequent to the making of the note, and to the delivery of the same to take effect, and he put his name there at the request of the maker pursuant to a contract of the maker with the payee for further indulgence or forbearance, he can only be held as guarantor; (3) if the note was intended for discount, and he put his name on the back of it with the understanding of all the parties that his indorsement would be inoperative until the instrument was indorsed by the payee, he would then be liable only as a second indorser, in the commercial sense."

With regard to the case in hand, the Circuit Court said—"The defendant indorsers represented all the stockholders and officers of the company which executed the notes. The notes were given on account of a debt owing from the company to the payee. They were duly executed by the maker,

and then, before delivery, indorsed by the other defendants. Credit was thereby given the maker with the payee, and such was the intention of the parties. The relations of the indorsers to the company made them, in a certain sense, participants in the consideration of the notes. The president of the company testified that Mr. Washburn said when the notes were executed that he did not know much about the corporation, and as the parties who afterwards indorsed the note owned all the stock, he desired them to become personally responsible on the notes. * * * It is apparent that the only object of the indorsements was to create an additional personal responsibility and secure credit to the maker with the payee, and the defendants must be held charged with the legal liability fairly flowing from their acts." (First National Bank v. Lockstitch Fence Co., 32 A. L. J., 248.)

Suit to Render Notes Non-Negotiable.—The decision of Presiding Justice Van Brunt, in the case of McGowan v. Gein (Daily Reg., Feb. 10) is a strong authority in support of the power of a Court of Equity to protect one who has given his notes on a purchase in a case where the notes, without agreement to that effect, were made negotiable, instead of being made dependent upon performance of the agreement and payable in kind. Many a purchaser or other contractor, agreeing to give his notes in advance for an obligation, which by an arrangement between the parties it was agreed might be satisfied by services or the delivery of goods, has found himself, in course of time, confronted by a suit brought by one claiming to be a *bona fide* purchaser for value before maturity, or in some cases even a suit by the payee himself, and has suffered a recovery against him of a money judgment, by reason of the familiar rule excluding oral evidence to vary a writing. This rule has often been applied against the maker of a note who sought to defeat such a recovery by proving an oral agreement of that kind. In the case to which we refer plaintiff, the maker of promissory notes and a mortgage to secure them, sued to reform the instruments by inserting in each of them, "payable as per contract for printing," it having been agreed that these notes were not to be paid in cash, but in printing at trade rates, and the clause in question

having been omitted by the oversight or mistake of the attorney. Judge Van Brunt, in sustaining the action, well said: "The plaintiff was entitled, as a matter of equitable relief, to have the agreement as to the method in which the notes were to be paid attached to the notes so that it would follow the notes into whosoever hands they should go."

The notes were liable to pass into the hands of *bona fide* purchasers before maturity, in which case the plaintiff would be liable for their payment in money to the holder, and because of the peculiar circumstances he was entitled to equitable relief from the Court.

The authority cited in support of this decision is the much quoted and frequently followed decision of the same judge, made at Special Term of the Common Pleas, in 1884, in the Elevated Railroad case. The distinction between the cases where plaintiff may maintain such an action and those in which he must wait until sued and set up his equities in defense, are in that case laid down as follows: "Since equitable defenses are available in actions of a legal nature, an action of an equitable nature cannot be maintained to cancel an instrument, if the circumstances are such that the plaintiff might bring a common law action as if the impeached instrument did not exist, and then, should it be interposed as a defense, avail himself of the equitable grounds of cancellation in rebuttal.

This rule applies, although the instrument which plaintiff seeks to enforce, and which defendant claims has been superseded by the instrument which plaintiff seeks to have cancelled be a lease having a long unexpired term; because an action for a single installment of rent and an adjudication that the rent was due, notwithstanding the instrument which plaintiff impeaches would effectually establish the cancellation of that instrument.

But if an equitable action be brought in such a case, and the facts proven show the plaintiff to be entitled to the legal relief, it seems that the action should not be dismissed.

But if the circumstances are such that one who is a necessary party to an action for the equitable relief is not a proper party to an action of a legal nature—as, for instance, where

success in recovering rent from a lessee depends on the cancelling of a tripartite agreement, involving a party in no way liable for the rent—an action in equity to cancel the instrument may be maintained. (*Metropolitan Elevated Railway Company v. Manhattan Railway Company*, 15 Abb. N. C., 103; S. C., 11 Daly.)

Holder of Note to Use Effort to Collect Note and Collateral.—

1. Where the holder of a promissory note with two accommodation indorsers has collateral security from the first indorser and obtains from a third party an obligation to pay any sum, not exceeding a certain amount, which the holder may fail to collect on the note or from the collateral, it is the duty of the holder to use every reasonable effort to collect the note and collateral; and when he has this without realizing the full amount of his claim his right of action on the obligation is complete.

2. Whether he made every reasonable effort or not is a question for the jury. (Argued Mar. 15, decided Apr. 16, 1888.)

July Term, 1887, No. 38, E. D. All the judges present. Error to the Common Pleas of Bradford County, to review a judgment on a verdict for the plaintiffs in an action of debt, December Term, 1884, No. 413. Affirmed.

The facts as they appeared at the trial before Morrow, C. J., are stated in his charge to the jury, which was as follows:

This is an action of debt brought by Pomeroy Brothers against Walter G. Tracy, to recover \$500 with interest from the 16th day of April, 1877. The plaintiffs' claim is based upon an agreement of Mr. Tracy which has been read in your hearing, and which is as follows:

Whereas, Pomeroy Brothers are the holders of a certain promissory note, made by the Towanda Eureka Mower Company, to the order of O. D. Bartlett, at ninety days, for the sum of \$5,000, and indorsed by the said O. D. Bartlett, which note was dated January 3, 1877; and whereas, said Pomeroy Brothers hold the assignment of a portion of a judgment against J. S. Madden, as collateral security to said note; and whereas, said Pomeroy Brothers desire further security on said note, now, in consideration of said request, and the sum of \$1 to me in hand paid, the receipt whereof is hereby acknowledged, I hereby promise to pay to said Pomeroy Brothers any sum which they may fail to collect on said note, or from said collateral, not exceeding in the whole deficiency which I am to make up, the sum of \$500 with interest from this date. Witness my hand and seal the 16th day of April, A. D., 1877.

W. G. TRACY, [SEAL.]

The undisputed evidence shows that John F. Means was treasurer of the Towanda Eureka Mower Company, and that as such treasurer he made a note, May 21, 1876, to Pomeroy Brothers for \$5,000, payable to the order of O. D. Bartlett and due at ninety days. That note was renewed from time to time, until about January 3, 1877, and the last note was protested for non-payment, and suit was brought against the Towanda Eureka Mower Company, and against O. D. Bartlett as indorser of that note. On the 6th of January, 1877, three days after this note was given, O. D. Bartlett assigned to Pomeroy Brothers, \$5,000 of a certain judgment of \$10,000 which he held against John S. and S. D. Madden, as collateral security for the payment of the note given by the Towanda Eureka Mower Company, three days before, to Mr. Pomeroy.

Judgment was obtained by the Pomeroy Brothers against the Eureka Mower Company, and also against O. D. Bartlett, upon this note of January 3, 1877. Pomeroy Brothers then issued execution against the Maddens, levied upon certain real estate, and sold it as the property of John S. and S. D. Madden. A rule was taken to set aside this sale, which rule was subsequently discharged, and a deed was made by the sheriff to Pomeroy Brothers for this Madden land. This land, however, was claimed by Mrs. J. S. Madden, under a deed, and the Pomeroy Brothers brought an action of ejectment against her and her husband to recover possession of the land which they had purchased at sheriff's sale.

This ejectment suit came on for trial before arbitrators, when it was settled; and by virtue of an agreement contained in a writing filed, the award of the arbitrators was in favor of Mrs. Madden for the land in question, and she and her husband executed to the Pomeroy Brothers a mortgage for \$3,250, which has since been paid. And [Mr. S. W. Pomeroy testifies that this \$3,250 is all that they ever obtained upon this Madden judgment, and that settlement was as good as could be made, and that he considered the Madden judgment, on account of Mrs. Madden's claim to this land, perfectly worthless.] [7]

At the time of making this settlement with Mrs. Madden, and as a part of the consideration therefor, Pomeroy Brothers assigned to her their interest in this judgment against J. S. and S. D. Madden, which had formerly been assigned to them by O. D. Bartlett as collateral security.

Pomeroy Brothers also obtained from John F. Means, who was a subsequent indorser to Bartlett on the note of January 3, 1877, a bond and mortgage for \$10,000 on forty acres of land lying in the township and borough of Towanda. Judgment was afterwards obtained on this mortgage, and this forty acres of land was sold and bid off for \$50 by the Pomeroy and R. O. Smith.

[Mr. Pomeroy testifies that they own five-twelfths of that land, and that R. O. Smith owns seven-twelfths, and that he considers the five-twelfths owned by the Pomeroy worth about \$700 or \$800. Whatever this value is, the Pomeroy are bound to apply on this indebtedness against the Eureka Mower Company. If you put the value of their share of this land at \$750 then the Pomeroy have received, according to their own statement, upon this indebtedness, \$298 from the sale of the Eureka Mower Company's property, \$750 from this John F. Means mortgage, and \$3,250 from the Madden settlement, making in all about \$4,298 which they have realized upon this loan of \$5,000 made to the Towanda Eureka Mower Company in 1877. Adding interest to this \$5,000 since 1877, and taking from the amount the different sums which the plaintiffs admit to have been paid, there would still remain due and unpaid at this date something like \$2,000, or much more than the amount of the paper in suit.] [8]

And the defendant has offered no evidence to contradict the statement of Mr. S. W. Pomeroy as to the different sums which they have received. They claim that the \$5,000 note not having been paid within \$500 or more, they are entitled to a verdict upon this agreement of Mr. Tracy's for \$500 with interest from its date. The defense to this claim is that Walter G. Tracy, not having had any interest in this thing, and having voluntarily given this writing in suit stands as a surety to O. D. Bartlett, that he stands in the same relation to the Pomeroy that O. D. Bartlett did, that he is entitled to

a re-assignment of the Madden judgment which Bartlett assigned to the Pomeroy's as collateral security, and that therefore by the Pomeroy's assigning this collateral to Mrs. Madden, W. G. Tracy is released and discharged from his obligation upon this paper, and that the plaintiffs cannot recover.

[Upon this subject we say to you that if the settlement made by the Pomeroy's with the Maddens was fair and honest and in good faith, if they got the full and fair value of this collateral and applied it upon their indebtedness, then the defendant would not be released by their action, and they may recover, providing they have not already received their pay. If, however, this settlement was not fair and honest and in good faith, if they did not obtain the full value of their collateral, and W. G. Tracy had been damaged thereby, then he would be entitled to have all such damage deducted from the plaintiffs' claim in this case.] [9]

You have heard the evidence in this case as to the insolvency of the Towanda Eureka Mower Company and of O. D. Bartlett, and the claim of Mrs. Madden to this land; and [it is for you to say whether, under all circumstances, the action of the Pomeroy's has been in good faith, and for the best interests of all concerned in making the arrangements and settlements which have been shown by the evidence. The defendant has offered no evidence tending to show that the Madden judgment was of any value whatever.] [10]

Defendant presented the following points:

1. The assignment by Pomeroy Brothers to Elizabeth Madden of their interest in the judgment against J. S. and S. D. Madden, which had been assigned to them by O. D. Bartlett as collateral security for the note of the Towanda Eureka Mower Company, indorsed by said Bartlett and John F. Means, was a conversion of it to their own use; and they are chargeable with its full value.

Ans. This point is refused under the evidence in this case. [3]

2. If the jury believe Pomeroy Brothers released their interest in the Madden judgment which they had obtained as security for their indebtedness against O. D. Bartlett, without

the consent of Walter G. Tracy, who is the surety of the said Bartlett, said release operates as a discharge of said Tracy from all liability therefor; and therefore the plaintiffs cannot recover in this case.

Ans. Refused. [4]

3. The acceptance by the Pomeroy Brothers from John F. Means, of his bond and mortgage dated July 8, 1879, given to them and R. O. Smith to secure the payment, *inter alia*, of the note of the said Towanda Eureka Mower Company indorsed by said Bartlett and said Means, and the agreement contained in the said bond that the said Means was to be released from further liability upon said note, and the subsequent sale of the mortgaged premises upon said mortgage, satisfied said Pomeroy Brothers' indebtedness against said Means, and released Walter G. Tracy, the surety of said Bartlett.

Ans. Refused. [5]

4. If the jury believe that Pomeroy Brothers released the John F. Adams from further liability upon said note of the said Towanda Eureka Mower Company, when they accepted his said bond and mortgage without the consent of Walter G. Tracy, said release operated as a discharge of said Tracy, and the plaintiffs cannot recover.

Ans. Refused. [6]

Verdict and judgment were for the plaintiffs for \$797.50 and costs.

The assignment of error specified: 1, 2, the rejection of certain offers of evidence by the defendant; 3-6, the answers to the defendant's points; and 7-10, the portions of the charge inclosed in brackets.

The use of the term collateral security, when a debtor transfers to his creditor an article of value, or an evidence of debt, is intended to express that it is not received in payment of the principal debt, and that it is not an additional right to which the creditor is absolutely entitled. It is merely a concurrent security for another debt, whether antecedent or newly created; and is designed to increase the means of the creditor to realize the principal debt which it is given to secure. (*Munn v. McDonald*, 10 Walk., 273.)

A holder of collateral security cannot appropriate it in satisfaction of the debt at his own option, unless authorized to do so by the terms of the bailment. (Diller v. Brubaker, 58 Pa., 498; Conyngham's Appeal, 57 Pa., 474.)

The holder of collateral security has an implied power to sell it, after a default by the pledgeor (2 Am. & Eng. Ency. of Law, 46); but he must give notice to the pledgeor, of an intent to sell, after the default of payment, and also of the time and place of sale, in the absence of a contract to sell *ex mero motu* (Davis v. Funk, 39 Pa., 243; Sitgreaves v. Farmers and M. Bank, 49 Pa., 359; Diller v. Brubaker, *supra*); this notice is required, in order that he may have an opportunity to redeem it, and the sale must be made public when made. (Diller v. Brubaker, and Conyngham's Appeal, *supra*.)

The Pomeroy Brothers did not perform one of these requirements. The plaintiff is not obliged to show that the collateral is of any value; and, therefore, it is immaterial what Pomeroy Brothers thought about its value. It belonged to the plaintiff in error if he was called upon to pay. (Neff's Appeal, 9 Watts and S., 43; Templeton v. Shakley, 107 Pa., 380; Humphrey v. Clearfield County National Bank, 5 Central Reporter, 133, 113 Pa., 417; Otis v. Von Storch, 1 R. I. (L. ed.) 64, 1 New England Reporter, 146; Donnell v. Wyckoff, 5 Central Reporter, 820, 49, N. J. L., 48.)

This collateral is, therefore, lost to the plaintiff in error, and he cannot be obliged to pay; for when collaterals are placed in the hands of the creditor himself and they are lost by his negligence the debt is extinguished. (Lyon v. Huntingdon Bank, 12 Serg. & R., 67; Collingwood v. Irwin, 3 Watts, 306; Beale v. Bank, 5 Watts, 529; Muirhead v. Kirkpatrick, 21 Pa., 237; Hanna v. Holton, 78 Pa., 334; McQueen's Appeal, 104 Pa., 595.)

When the creditor conveys them to his own use he is chargeable with their full value. (Spalding v. Bank of Susquehanna County, 9 Pa., 28; Bank of U. S. v. Peabody, 20 Pa., 457.)

It was incumbent on plaintiffs to produce and restore the collateral. Nor can they escape it by showing that it has become worthless. (Stuart v. Bigler, 98 Pa., 80.)

The measure of loss is the amount of the collateral. (McQueen's Appeal, *supra*.)

If a creditor release a security which he has obtained for the whole debt, it will operate as a release or discharge of the surety from all liability as such; (Neff's Appeal, *supra*; Holt v. Bodey, 18 Pa., 212; Templeton v. Shakley, *supra*) and also, any act on the part of the creditor by which the surety is deprived of the use of a security, which he might have looked to for his indemnity, operates as a discharge of such surety. (Tiers v. Blair, 3 Phila., 451.)

A surety in the original obligation is entitled to subrogation as against a subsequent surety of the principal. (McCormick v. Irwin, 35 Pa., 111; Burns v. Huntingdon Bank, 1 Penr. & W., 395; Potts v. Nathans, 1 Watts & S., 155.)

Means, therefore, might in some contingency have claimed subrogation. Subrogation will not be decreed to the rights of a creditor who has not been fully satisfied. (Kyner v. Kyner, 6 Watts, 221; Bank of Pennsylvania v. Robins, 10 Watts, 148.)

If the defendants in error received their pay on the note from Means, of course they could not collect again from Tracy; but the undisputed evidence is that they have not done so.

Mr. Justice Clark delivered the opinion of the Court. The principles of subrogation in equity have, in our opinion, no application whatever to this case; the only question is whether or not the plaintiffs have proceeded upon their note and the collaterals with due diligence, and have in good faith applied the proceeds, and having exercised such diligence, have failed to collect the full amount of the note.

The Eureka Company were principal debtors, and, in equity and good conscience, ought to pay the debt for which the bond in suit was taken as an additional security. Bartlett and Means were accommodation indorsers merely, and therefore sureties for the company; and so was Tracy a surety, but his equity attached, subject to the prior equities of Bartlett and Means; he resumed a new and independent responsibility, with knowledge of their antecedent equities. He was

a volunteer; his undertaking was at the instance of Pomeroy Brothers, in order to better secure the debt owing to them.

If Tracy had paid the \$500 in full satisfaction of Pomeroy Brothers' claim, he might, perhaps, have been subrogated to their rights as against the company. This would probably depend upon the special circumstances under which the obligation was assumed. But we cannot see upon what principle he could have been substituted to their rights, as against Bartlett and Means, whose equities were not only essentially equal to, but earlier than his. Nor is it entirely clear to our minds that Bartlett and Means, upon payment of the whole debt, would have had any such right as against Tracy; for his liability, as we have said, was incurred not at the instance of the company, the principal debtor, or for its advantage, or to the disadvantage or delay of the indorsers; the obligation in suit was an independent undertaking on the part of Tracy, which could do the company no good, and the indorsers no harm.

It is a general doctrine of equity that where a surety pays the debt of his principal, he may avail himself of the securities which the principal has placed in the creditor's power, "but," as Mr. Justice Sergeant said in *Pott v. Nathans*, 1 Watts & S., 155, "where such means consists of the responsibility of an individual becoming a later surety or guaranty for the same debt of the principal, there arises a conflict of equities, which may give rise to new questions as to priority between the former and the latter surety. Such latter surety, stipulating at the instance of the principal to pay the debt, suffers no absolute injustice in being obliged to do so, since he is compelled to do no more than he undertook; and he has no right to complain that he is not allowed to use, as a payment by himself, the money which proceeds from another person whom his principal was previously bound to save harmless. How the equity would be, in a naked case of this kind, I give no opinion; it is sufficient that it is settled that if the interposition of the second surety may have been the means of involving the first in the ultimate liability to pay, the equity of the first surety decidedly preponderates."

If Tracy had simply agreed, at the instance of Pomeroy Brothers, to become bound as an additional surety, for the payment of this debt, to the amount of \$500; if that were the "naked case" presented, we cannot see that Tracy would have any right to complain, if he was obliged to do just what he undertook to do; or that he was not allowed to use the Madden collateral, because that collateral did not belong to the company, but to Bartlett, whom the company was previously bound to save harmless; and if the interposition of Tracy was in no sense an advantage to the company, and could not be the means of involving the indorsers in the ultimate liability to pay, we cannot discover any equity which would arise, if the controversy were between the indorsers and Tracy, to impose the ultimate liability on him.

The nature and extent of the engagement into which Tracy entered is, therefore, to be ascertained from the terms of the writing in suit; the question of his liability must be determined upon the reasonable construction of the contract by which his liability is attested. Tracy's obligation to pay was not an absolute one; it was qualified by certain conditions. He was bound to do just what he agreed to do and no more. He promised "to pay to Pomeroy Brothers any sum which they might fail to collect on said note, or from said collaterals," not exceeding, in the whole deficiency which he was to "make up," the sum of \$500, with interest, etc.

The failure to collect, which was in the mind of the parties, was of course such as resulted from a reasonable effort in that behalf; and the question of fact for the jury was whether Pomeroy Brothers exercised reasonable diligence in the collection of the note and the collaterals. If they have done so, and have justly and in good faith applied the proceeds of the collection, at their true value, to the debt, they have done all they were required to do, in order to fix Tracy for the amount of his collateral obligation.

It is conceded that the Eureka Company was pursued to insolvency, and that no money could be made more than was made from that source; it is also conceded that the plaintiffs were not able to collect any thing from Bartlett. It is of no consequence to Tracy that the collaterals were transferred to

Mrs. Madden, if their value was exhausted; if Bartlett, to whom they belonged, consented to this, Tracy had no right to complain; Tracy had no claim to these collaterals by subrogation or otherwise; his right, under his contract with Pomeroy Brothers, was to have a reasonable effort made to collect them, and to have the proceeds of collection applied to this debt at their actual or real value and this, according to the finding of the jury, was done.

Means, it is conceded, was insolvent; he compromised with his creditors; Pomeroy Brothers and R. O. Smith, together, took a mortgage on forty acres of land worth \$1,750 to \$1,800; there is no evidence that anything better could have been done, or that any more of the claim could have been made out of him; indeed, it is not shown he had any other property. It is true that upon the delivery of this mortgage Pomeroy Brothers released Means from further liability on the note, but this was of no consequence to Tracy. Means was only a surety, and Tracy, as we have said, had no equity which would entitle him to stand in Pomeroy's place as against Means. Mr. Pomeroy had taken the kernel out of Means' estate, and Tracy was not in position to demand that the empty shell must be turned over to him before any liability would attach on his bond. The duty of Pomeroy Brothers was to use every reasonable effort to collect the note, and also the collaterals; and when they had done this, without realizing the full amount of these claims, their right of action against Tracy was complete. Pomeroy Brothers were not bound to await the mere possibility that Bartlett's collaterals might some time become available, or that Means might rise above insolvency.

We are of opinion that the case was properly submitted to the jury, and the judgment is affirmed. (Walter G. Tracy v. Horace Pomeroy *et al.*)

PARTNERSHIP.

General Remarks.—One member of a firm cannot make an assignment of his firm for the benefit of creditors, except in very few and rare cases; nor confess a judgment in the firm name nor bind the firm by an award in arbitration.

The use of the words "& Co." is not permitted by the statute of many states where only one person is engaged in business, for the reason that it would tend to obtain greater credit thereby, under the implication that several persons constituted the firm. This is modified where there had been more than one person in the firm for a fixed period of some years, (in some states five years) and where the fact of the discontinuance of the firm by the survivor is advertised and a notice thereof filed in the proper county office, in the case of dealing with foreign countries. But the change of name by one of two persons in a firm where both names appear without the change of name appearing, would not come under the head of fictitious name or use of the "& Co.," as there would in that case be no change of the person.

Limited partnerships are controlled by the statutes of the various states, and they are quite uniform in their requirements that a certificate be properly drawn, acknowledged, published and filed, containing the names of the general and special partners, the amount of capital paid in cash by the special partner, the duration of the partnership, the firm name, etc.

Upon a renewal or continuation of a limited copartnership the same formalities must be observed as upon the formation of the firm, otherwise the special partner may become liable as a general partner to the creditors of the firm.

The states which permit preferences in general assignments for the benefit of creditors, do not allow preferences to be made in the case of a limited partnership. A preference made in such a case would render an assignment void.

Receiving Benefits from a Firm and Recognizing the Partnership Constitutes a Partnership.—Where several persons entered into an agreement in writing which they thereafter changed and all but one executed the second written agreement, the latter receiving benefits, however, thereunder and recognizing the partnership, is considered at law a partner in all respects. (Bush v. Bush, 89 Missouri, 360.)

Persons Engaged together in a Common Enterprise become Partners.—Persons engaging together in a common enterprise, in the joint purchase of land, the price of which was

borne equally between them, are partners so far as the land purchase and holding of the same are concerned. (4 New York State Reporter, 893.)

Participation in Profit and Loss does not Necessarily Constitute a Partnership.—A partnership is not necessarily constituted by the mere fact of participating in the profit and loss, so far as it affects a third person, it requires the element of interest in the property or business engaged in. (89 Missouri, 192.)

Liability Incurred by Permitting Others to Believe One to be a Partner.—“By holding, or permitting themselves to be held out as such, persons not in fact partners may become liable to third parties who believe them to be partners.” (Sun Insurance Company v. Konntz Line, 122 United States, 583.)

Difference between Trading and Non-Trading Partnerships.—Trading and non-trading partnerships are widely different as bearing on the question of implied authority of one partner to bind his firm upon negotiable paper made by him in the name of the firm. The authorities hold uniformly that, in a “commercial partnership each acting partner is its general agent, with implied authority to act for the firm in all matters within the scope of its business, and the presumption of law is that all commercial paper which bears the signature of the firm, executed by one of the partners, is the paper of the partnership, for the reason that the giving of such notes would be within the usual course of mercantile transactions. But as to non-trading partnerships, the doctrine of general agency does not apply, and there is no presumption of authority to support the act of one partner. Hence, in order to subject the firm upon a bill or note executed by one partner in its name, a course of conduct, or usage, or other facts sufficient to warrant the conclusion that the acting partner had been invested by his copartners with the requisite authority, must appear, or that the firm has ratified the act by receiving the benefit of it.” (3 New England Reporter, 647.)

Contract, Effect on Creditors.—A copartnership agreement gave or assigned to one of the partners the duty of conducting the financial settlements. Unless the agreement gave this

partner the sole and exclusive control over the finances of the firm, and it appeared in clear and distinct terms, it may not be so construed as abrogating or dividing the general partnership authority. Hence it is held as the law that a settlement made by the *other* partners or members of the firm with one indebted to it, was valid and binding upon the firm.

An action brought to set aside such a settlement on the ground of collusion and fraud on the part of the *other* members of the firm and the debtor, it was decided that the partner claiming fraud, or proof of the fraud alleged, was not entitled to set aside the settlement, or to recover the debt which was discharged, or his proportion thereof; but to recover the damages sustained by him, which could only be the diminution of his partnership share produced by collusive waste of the partnership assets, and this could only be ascertained by a settlement of the partnership account; also, that he had a right, notwithstanding the settlement, to be placed in the position he would have been in if the full debt had been honestly paid to his copartners, and he had received his aliquot share of the assets thus increased, after payment of the firm debts. (*Sweet v. Morrison*, 103 New York, 235.)

Liabilities of Retiring Partner.—Insufficient Discharge from Old Firm Debts.—An illustration of the manner in which a retired partner may remain liable for the old debts of the firm, notwithstanding their assumption by the remaining partners, or new firm, and even a release by the creditor, is afforded by the following decision in the Philadelphia Court of Common Pleas:

It was rendered in a suit by Edward S. Clarke against Charles Brooks, to recover \$15,000 for money loaned. Mr. Brooks was sued as a member of the firm of Brooks, Miller & Co., which, up to December 31, 1879, was composed of himself, J. D. Brooks and D. L. Miller. On this date Charles Brooks retired from the firm, the debt of the firm to Mr. Clarke being in existence at the time of his withdrawal. J. D. Brooks and Mr. Miller, however, continued the business and agreed to assume all the debts of the firm. The dissolution was duly advertised, and this, together with the assumption

of the old debts by the new firm, was known to the plaintiff, who accepted interest from the new firm at different times, up to October, 1884, when they failed. After the failure the plaintiff made a demand for payment on Charles Brooks, who had, as stated, retired from the firm five years before. Another fact stated by the defendant was, that, after the dissolution of the firm, the plaintiff surrendered the due-bill of the old firm and took in its stead one made by the new firm.

The question for the Court was, whether, under these facts Charles Brooks was liable. Judge Biddle held that he was. The contention of the defendant was that the surrender of the old due-bill for a new one by the new firm was a release of Mr. Brooks' liability, but the judge held that the release was void, because there was no consideration for it.

There is no question that so far as Pennsylvania law is concerned, the rule laid down by Judge Biddle is sustained by authority. In the case of *Walstrom v. Hopkins*, (103 Pa. St., 118) cited as expressly ruling the present, the facts were stated in the affidavit of defense as follows:

During July, 1878, the firm of Bowker & Hopkins was dissolved, and Abraham Hopkins continued the business, agreeing to pay all debts. The usual notice of dissolution was published, but, in order that knowledge of dissolution should be brought directly to the firm of Walstrom & Stevens, your deponent notified them both of said dissolution, and that the debts would be paid by Bowker, according to agreement, and the notice published. Walstrom & Stevens said they were satisfied with Bowker as a debtor; that they had often done work for him. That they would release your deponent, and look to Bowker for the debt, which he was and now is able to pay. Plaintiffs (Walstrom & Stevens) continued furnishing goods to Bowker after they had received notice of dissolution, and no demand of any kind has ever been made on deponent on account of this debt until this suit was brought.

The Pennsylvania Supreme Court, in passing on these facts, announced their opinion as follows:

When a creditor is fully informed of an arrangement between partners by which the outgoing member of the firm is to be indemnified against the debts of the firm, and he agrees to consider the remaining partners as his exclusive debtors, he *may* thereby (the italics are the Court's) lose all right of claim against the retiring partner. But when all this is admitted it does not reach the defendant's case. For when we come to consider how the creditor "may" thus lose his right we learn that it can result only from some advantage gained by him or from some prejudice suffered by the retiring partner. In other words, taking the authorities cited by the defense and we are brought back through the somewhat ambiguous language that is made use of to the well known and well established doctrine that a contract, in order to render it effective, must be founded upon a consideration of some kind, otherwise it is mere *nudum pactum*.

But in the affidavit of defense under discussion there is no allegation of consideration, however remote, on which to base the alleged release. * * * Here is at best but a promise to release on request of the defendant without consideration expressed or implied; nor does it appear that by reason of such promise the affiant has suffered any prejudice whatever. According to his own oath, Bowker is still solvent and responsible over to him. He, therefore, loses nothing by delay; he has but to pay the partnership debt and be repaid by his partner.

The English Courts in the first instance came to a similar conclusion, but afterward took advantage of a slight distinction in the circumstances to depart from it. In the first case there was no change of paper securities; in the last a bill of exchange signed by one of the parties was given for the debt. This the Court considered an advantage to the creditor, and said "if, therefore, the plaintiffs in this case did expressly agree to take, and did take, the separate bill of exchange of James in satisfaction of the joint debt, we are of opinion that his doing so amounted to a discharge of Charles." (Thompson v. Percival, 5 B. & Ad., 925.)

In another English case it was held that "a creditor who assents to a transfer of his debt from an old firm to a new

firm, and goes on dealing with the latter for many years, making no demand for payment against the old firm, may not unfairly be inferred to have discharged the old firm. If a jury finds that he has done so, the Court will not disturb the verdict."

Apparently the Rhode Island Supreme Court thought the Pennsylvania doctrine harsh law, even if sound law, and under somewhat similar circumstances, Bromley & Moulton being jointly indebted for certain work done, and Moulton claiming that the creditor had released him and agreed to look to the other partner only, the Court said:

If by a mutual arrangement between the plaintiff Collyer and the two defendants, Moulton had been released from liability for the work already done, and a new promise made by Bromley, the other defendant, to pay for it, this would have been a valid release for a valuable consideration—one debt would have been substituted for the other. But we cannot find sufficient evidence of any promise on the part of the other partner, Bromley, to assume the liability; and if there was none, then the release of liability for the work already done was without consideration, as it is not claimed that there was any other consideration. (*Collyer v. Moulton*, 9 Rhode Island, 90.)

On this theory, applied to the Philadelphia case, the due bill of the new firm accepted by the creditor, Clarke, in place of the old firm's obligation was in itself a sufficient consideration releasing the retiring partner.

In New York, as in Rhode Island, the situation of a retired partner with old firm debts in existence is somewhat more satisfactory than in Pennsylvania. This will appear from the facts in the case of *Millerd v. Thorn*, 56 New York, 402. The firm of William B. Thorn & Co. were indebted to that of N. Millerd & Co. for goods sold and delivered, when Thorn & Co. dissolved, Smith, one of the partners, continuing business and assuming payment of the debts. The creditors, with knowledge of this fact, received from Smith \$25 in money and his individual note for the rest of the amount due them, in discharge of the firm indebtedness. The question whether the money and note were actually received "in payment" seems

to have been considered one for the jury to pass upon, but the effect of their receipt as such was thus stated by the New York Court of Appeals:

When a creditor of a partnership after dissolution thereof, knowing that one or several of the partners have agreed with the others to assume and pay the debts of the firm, takes the negotiable notes of those who should pay, in payment of the debt of the firm, he thereby cancels the claim against the firm and discharges the other partners.

The Vermont Supreme Court made a similar decision in *Stephens v. Thompson*, 28 Vermont, 77, and declared it to be the doctrine of the Massachusetts cases.

We find it somewhat difficult, however, to reconcile the subsequent language and ruling of the New York Court with the above expressions. The Court, in the same case cited, went on to say:

By the agreement of Smith upon the dissolution of the partnership between the defendants, to assume and pay the debt due the plaintiffs, he became, as between him and Thorn, the principal debtor, and the latter his surety for payment. If the plaintiffs, with knowledge of these facts, made a valid agreement with Smith to extend the time of payment, they thereby discharged Thorn.

If the Court was right in the first of the above quotations, it seems to proceed on a different state of facts in the second.

It is, however, stated in the books generally that the position of a retired partner is that of surety for the old debts of the firm. From this position it is well to know there is a way of release discovered by a Vermonter who found himself so situated. He induced his brother to buy the debt and bring suit against his former partner to enforce its collection, and so forestall any demand upon himself. The suit was successful, and other retired partners who may, by the Pennsylvania decision be put in fear of old liabilities from which they thought themselves discharged, may think the example worthy of imitation. (*Ætna Insurance Company v. Peck*, 28 Vermont, 93.)

Accommodation Guaranty.—Single Partner's Authority.—McL. and D. P. made a promissory note to the order of F., T. & Co., and solicited T., a member of the firm, to indorse it for accommodation, representing that it would be presented for discount at one of the banks in the city. T. indorsed it, without authority from his partners and not in their presence. The note was then sold to A. & Co., and the makers having failed, F., T. & Co. were sued on their promise to pay it, written by A. & Co.'s counsel, above the indorsement. The Supreme Court held that the firm was not bound, on the principle that a single partner has no power to bind his firm to a guaranty given for accommodation. (*Sweetser v. French*, 56 Massachusetts, 319.)

Share of Profits by Agreement with One Member of a Firm as to his Profits does not make the Party a Member of the Firm.

DANFORTH, J., delivered the opinion of the Court.

The plaintiff, claiming to be a creditor of Samuel H. Miller and Jesse E. Folk, after service of the summons on the defendant, Folk, recovered judgment against them as joint debtors in the sum of \$1,064.48. Execution issued against the joint property of Miller and Folk, and the individual property of Folk was returned *nulla bona*. This action was then brought by the plaintiff as such judgment creditor against Miller and one John C. Cook. Its object was to set aside an assignment made by Miller to Cook as assignee, for the benefit of Miller's creditors.

The case was tried at special term and judgment of dismissal ordered in favor of defendant. The conclusion of the trial judge upon the evidence was satisfactory to the general term, and an examination of the record discloses no finding that is not supported by testimony. We have only to see whether upon these findings any error was committed by the trial judge in his conclusion of law.

It appears that on the 1st of January, 1873, the defendant Miller, and one Eastmead formed a partnership under the firm name of Miller & Eastmead, to commence at that time and terminate on the 31st of December, 1877. The profits

of the business were to be divided equally. It was agreed between Eastmead and Folk that Folk should receive such share of the profits of the business of Miller & Eastmead as should accrue to Eastmead, leaving it to the discretion of Folk as to the portion which Eastmead should retain, such portion, however, not to be less than one-fifth. This arrangement between Eastmead and Folk was assented to by Miller, upon the condition that the agreement should in no respect conflict with the conditions or terms of partnership between himself and Eastmead, or in any respect invalidate or prejudice the rights secured by the copartnership articles. Folk did not become a partner in said firm, nor did either of the parties thereto intend that he should. The business was continued by Eastmead and Miller until December 31, 1877, when the copartnership expired by limitation and Eastmead's connection with the business ceased. After that time and until the 18th of July, 1882, the business was continued by Miller individually, but in the name of Miller & Eastmead; the property and assets theretofore belonging to or used in the business were employed and possessed by Miller as his own. On the 10th of July, 1882, he executed an assignment of all his property to the defendant, Cook, for the benefit of his creditors. The trial judge found that the assignment was in all respects lawful, just and fair, and was made by Miller and accepted by Cook in good faith and without any fraud. Upon these facts it necessarily followed that the plaintiff's action failed.

The arrangement between Eastmead and Folk, as it was not intended to, so it did not give Folk any right or interest in the firm business, nor did it make him a member of the firm of Miller & Eastmead. His profits were to come, not from the firm, but from Eastmead, and the case is brought directly within our decision in the case of *Burnet v. Snyder*, 76 New York, 344.

There are further facts found by the trial judge, in effect that Folk knew of the intended assignment and ratified it; but that is unimportant, since in the other view he had no interview whatever in the business of the firm, nor any right

which could be reached by a creditor until after the firm debts had been satisfied. Whatever claim he had was against Eastmead, with whom alone he had contract relations. We think the trial judge properly dismissed the complaint, and that the general term committed no error in affirming its decision.

The judgment appealed from should, therefore, be affirmed.

All concur, except Rapallo, J., absent.

(Rockafellow v. Miller, 9 Central Reporter, 862.)

Effect of Will Over Partnership.—An Estate Sued for the Debts of a Surviving Partner.—The General Term of the Supreme Court, sitting at Poughkeepsie, has just handed down a decision of considerable importance to business circles.

It appears that in February, 1877, Joseph Colwell, of New York city, since deceased, and Samuel S. Hepworth, of the same place, entered into written articles of copartnership to manufacture and sell centrifugal and other machinery for a period of five years from the 1st day of January, 1877, under the firm name of S. S. Hepworth & Co.

The copartnership business under these articles was continued up to the 13th of October, 1881, when the parties entered into another agreement, which provided that the copartnership should be continued until dissolved by consent, or by six months notice by one of the partners. The last-named instrument also contained the following provision, upon the force and effect of which the action just decided depended:

“In the event of the death of either, the business should be continued by the survivor until the expiration of five years from the first day of February next succeeding such death, the estate of the deceased partner to have the same share and interest in the profits and to bear the same share of the losses of the business as would have been received and borne by the deceased partner had he lived.”

The second instrument was, a few weeks later, followed by Joseph Colwell making his last will and testament, in which he failed to in any manner recognize the possibility of the continuance of the business after his death.

Shortly after the execution of his last will and testament Joseph Colwell died, leaving an estate amounting to about \$200,000 over and above his interest in the business. The will was probated, and the executors and trustees thereunder qualified and entered upon their duties. Samuel S. Hepworth, upon the death of his partner, took possession of the business of S. S. Hepworth & Co., and continued to manage and control the same until the 4th day of October, 1887, when he was compelled to make an assignment in insolvency, having incurred indebtedness aggregating about \$500,000 subsequently to Joseph Colwell's death.

Stewart Brothers, of Yonkers, creditors of the insolvent business of S. S. Hepworth & Co., had assigned to them a number of other claims in order that they might all be sued in one action, and thereupon commenced this suit against the estate of the deceased Colwell, upon the ground that under the second copartnership agreement the estate was rendered liable for the debts of the business of S. S. Hepworth & Co., incurred subsequently to Colwell's death.

The action was brought through Prime, Prime & Burns, of Yonkers, as a test case, wherein to have judicially established the liability of the Colwell estate for the debts of S. S. Hepworth & Co. The executors and trustees of the estate appeared and defended the suit through Messrs. Ellison, Gill & Porteous, of New York, who raised the following defenses:

(1) That the provision contained in the second copartnership agreement relating to the continuance of the business after the death of either of the partners, was invalid and void for the reason that it was an attempt on the part of the said Colwell to manage and control a portion of his property, namely, his interest in the said copartnership business, after his death, which could be done only by a last will and testament, and not by an agreement or contract; (2) that in so far as said agreement did attempt to so manage and control such portion of his property after death, it was in its nature testamentary, and was revoked by last will and testament, and was as a testamentary disposition invalid for the reason that the agreement was not executed in conformity with the statute in relation to the execution of wills; (3) that the

absolute ownership of the property devised to the children of any deceased child of the said Colwell, under the will, might be suspended for the term of five years specified in said agreement, and not for the term of two lives in being, as required by statute, and such agreement was therefore invalid; and (4) that even if the agreement were valid, it did not contain a sufficiently clear expression on Colwell's part of an intention to render his general estate liable for the debts of the business.

The case was tried on the 4th day of February, 1888, before Justice Dykman, of the Supreme Court, at White Plains, Westchester County, and was decided in favor of the estate of Joseph Colwell and against the creditors of S. S. Hepworth & Co., whose indebtedness was incurred by Hepworth subsequently to Colwell's death.

From this decision the plaintiffs appealed, and the Appellate Court has affirmed Judge Dykman's decision in favor of the Colwell estate.

Presiding Justice Barnard wrote the opinion of the Court, and after reviewing the facts, said:

"A direction by the testator to apply his estate to a partnership for five years would have been clearly illegal as against his creditors, and even his next of kin and devisees. The clause in the contract, I think, has no greater effect than to permit the surviving partner to take five years to close up the partnership without intending or fairly meaning that the general estate of the testator was to be bound for the new debts credited by the surviving partner after his death, other than those incurred in closing up the business. Nothing but the most clear and unambiguous language demonstrating in the most positive manner that the testator intended to have his general assets liable for all debts contracted in the continued work after his death, and not merely to limit it to the funds embodied in that work, would justify the Court in arriving at such a conclusion, from the manifest inconvenience thereof and the utter improbability of paying off the legacies bequeathed by the testator's will or distributing the residue of the estate, without in effect saying, at the same time, that the payment should be recalled if the trade should become unsuccessful or ruinous."

Creditors Cannot Hold One not a Partner who Agrees with a Partner of a Firm to Indemnify such Partner Against Firm Debts.

EARL, J., delivered the opinion of the Court.

This action was brought by the plaintiffs, who held claims against the firm of Zeiss & Co., which firm was composed of Zeiss and Maria A. Brown, the wife of the defendant, to recover upon such claims against the defendant, upon the ground that he had assumed the payment of them. It was alleged in the complaint that on or about the 8th day of January, 1881, Zeiss sold all his interest in the firm property to the defendant, and that as part of the consideration of the sale the defendant agreed to pay all the firm debts, including the claims of the plaintiffs. The defendant put in issue all the material allegations of the complaint.

Upon the trial it appeared that Zeiss and Mrs. Brown entered into copartnership for the purpose of manufacturing and selling varnish at Windsor in Canada, for the term of three years, commencing July 1, 1878, and ending July 1, 1881; that Mrs. Brown contributed her own capital to the firm; that the defendant had no interest therein, but that he held a power of attorney under seal to act for his wife. The firm business was conducted until January, 1881, when the defendant opened negotiations with Zeiss for the sale of his interest in the firm and his retirement therefrom. The negotiation terminated in the execution of a written agreement dated January 11, 1881, by which Zeiss sold out all his interest in the firm business and assets to Mrs. Brown, she agreeing, as the consideration of the sale to her, to pay him the sum of \$300, to allow him to retain \$700, which he had wrongfully taken of the funds of the firm, and to assume and pay all the debts of the firm. The agreement was under seal, between Mrs. Brown of the first part and Zeiss of the second part; and it was first signed by "Maria A. Brown, per Andrew Brown, attorney in fact," and then by "W. Zeiss," and it was acknowledged by the defendant as attorney for his wife and by Zeiss before a notary public.

It is not alleged that there was any fraud in the draft or execution of this agreement. It was read over to Zeiss and

he testified that he understood it. He made objections to some of the language used in it and looked it over himself. The defendant and the attorney who drew the agreement testified that it expressed truly the whole agreement between the parties. Yet Zeiss was permitted to testify that he did not understand it as written, and that he understood he was making the sale to Kruger & Co., although that name did not appear in the writing, and was not mentioned at the time the writing was signed. But he did not testify that he made the sale to the defendant, or that he understood that he made it to him. He testified, however, that Kruger & Co., to whom he supposed he was making the sale, were to assume and pay the firm debts. It is clear, from his evidence, that he understood and that it was agreed that the purchaser, whoever he was, was to assume and pay the firm debts. But he also testified that the defendant said during the negotiations and before the execution of the written agreement that he, Zeiss, "should be relieved from all indebtedness of the firm;" that he, the defendant, "would see that the creditors are paid;" that it was the agreement that he "was to pay the debts." It is left uncertain which of these phrases, if any of them, was used by the defendant.

It is not a fair inference from the situation or from any things said or done during the negotiations that the defendant, who had no personal interest in the firm, who was not under any liability for the firm debts, and was not the purchaser of the interest of Zeiss in the firm assets, meant or was understood by Zeiss to bind himself personally for the payment of all the firm debts. He was present at the negotiation as the attorney of his wife and was acting for her; and the fair construction of all the language imputed to him is that he was speaking and acting for her when he gave the assurance that all the debts should be paid, and that assurance was carried out and embodied in the written agreement. By this construction the language imputed to the defendant is brought into harmony with the written agreement and with the undisputed facts surrounding and attending upon its execution.

The burden was upon the plaintiffs to show that the defendant agreed for himself to be personally bound to pay the firm debts; and a careful scrutiny of the record satisfies us that there is scarcely a scintilla of evidence to prove such an agreement, and the jury should not have been permitted to find it.

But suppose the plaintiffs are right in their contention that the defendant used the language imputed to him by Zeiss and above quoted, meaning thereby to bind himself personally, then we think it cannot be said that his agreement was made for the benefit of the plaintiffs. It was an agreement for the benefit of Zeiss to relieve him from and indemnify him against the debts of the firm, with an intention to secure any benefit to the firm creditors; and as the sale was not made to the defendant and no consideration whatever passed to him, these plaintiffs, strangers to the agreement, cannot enforce it against him. (*Merril v. Greene*, 55 New York, 270; *Simson v. Brown*, 68 New York, 355.)

But the plaintiffs have to encounter a still further difficulty. The agreement imputed to the defendant is invalid under the Statute of Frauds, because not in writing. As before stated the sale was not to the defendant. He took no interest in the property conveyed, and received no benefit from it, as all the firm property was subsequently sold and its proceeds applied upon firm debts. He was not antecedently liable for the payment of the firm debts, and had no personal interest in their payment. The liability of Zeiss for the debts was not extinguished but remained in full force, unaffected as between him and the firm creditors. The defendant's promise, therefore, assuming that it was made, was to answer for the debts of Zeiss, or for the default of Kruger and Co., or for the default of Mrs. Brown; and in either event it was invalid under the Statute of Frauds. It matters not that there was a consideration of harm to Zeiss from his transfer of the property; there was no consideration of benefit to the defendant. For the conclusion we thus reach the cases of *Mallory v. Gillett*, 21 New York, 412, and *Belknap v. Bender*, 71 New York, 446, are ample authorities.

The plaintiffs should, therefore, have been non-suited; and hence the judgment should be reversed and a new trial granted; costs to abide the event.

All concur, except Rapallo, J., absent.

(Berry v. Brown, 9 Central Reporter, 896; decided November 29, 1887.)

Liquidation of Partnership Affairs.—Who Shall Direct it.—

1. Where the lessor and lessee of a quarry entered into an agreement for carrying on the business together under a company name, and on the expiration of the agreement the lessor filed a bill against the lessee to determine which had the right to control the winding up of the business, held, that allegations in such bill in reference to the title of the lessor to the land on which the quarry was situated were irrelevant and should be stricken out.

2. An allegation in such bill, that the defendant held a lease of the quarry as agent only, and that in his dealings with others he signed his name as agent only, and that in his dealings with others he signed his name as agent, held, proper.

3. It appearing that complainant was entitled to the possession and control of the books and accounts of the concern, and of mail matter addressed to it connected with the business before the expiration of the agreement between him and defendant, but that defendant was continuing business under the same company name, and was entitled to mail matter addressed in that name connected with the business carried on by him alone, held, that a third person should be appointed to receive all mail addressed in the company name and deliver it to the party in his judgment entitled thereto.

4. The business having been of small proportions, and it not appearing that complainant was not able to respond to defendant for any moneys found due defendant, held, that the appointment of a receiver, asked for by the defendant by cross-bill, was not advisable. (Filed May 10, 1888.)

Bill to control the winding up of a business and for an injunction. On motion to strike out portions of the bill and to dissolve an injunction and for the appointment of a receiver, granted in part.

The facts are stated in the conclusions of the vice-chancellor. Bird, V. C., filed the following conclusions :

“The parties to this case, as appears by the bill, had entered into an agreement, in and by which Warne was to quarry and furnish certain materials, which the complainant was to manufacture into pulp. The manufactured article was to be sold by Warne. The compensation to each for his services was definitely fixed in the agreement. They did business under the name of ‘The Lizzie Clay and Pulp Manufacturing Company.’

“The agreement having expired, the question has arisen as to which has the right to settle with the creditors of the concern and to collect the amounts due for material sold ; and to this end which of them has the control of the correspondence and the books, Warne’s claiming the right to retain the possession of all the books and to keep them under his own control, and to take charge of all letters directed to the company, and to receive all remittances and to account therefor, at his will to Wagoner, induced Wagoner to file his bill, and to ask thereby for an injunction restraining the said Warne from taking from the post-office any letters addressed to the said company, or any package or document, and from opening the same, and from appropriating them to his own use, and from receiving any other articles belonging to and addressed to the said company ; and that he may be restrained also from interfering with Wagoner in taking said letters from the post-office, and in taking possession of the said books of account. By the bill he also asks that the said Warne may account for the moneys which he has received by and through the letters which he has already taken from said post-office.

“In the bill filed for these objects there are certain allegations which the defendant asks to have stricken therefrom, as being irrelevant or impertinent. One allegation is that the complainant ‘is the owner in fee of the lands upon which the quarry upon which the said Warne claims to have the lease is situated ; and your orator further shows that he himself has the exclusive right to quarry a short distance west of the quarry upon which the said Warne claims to have the lease.’

"These, I think, are totally independent allegations, and are in no way shown to have the slightest connection with any other part of the bill. It does not appear that the relief sought, in any degree whatsoever, depends upon the ownership of the title to either quarries. If the injunction is maintained it cannot, by any possibility, depend upon either of these allegations. It would seem therefore proper, in every sense, to remove them from the bill. If they are of any value the defendant would be obliged to answer; and hence the controversy about a matter which cannot, in the judgment of the court, in any sense affect the rights of the complainant under the bill as framed in all other particulars. I think the motion to strike these allegations from the bill should prevail with costs.

"Another allegation is that the defendant pretends to hold a lease for the said quarry, but which he does not hold at all in his own right, but only as agent without the said agent specifying whose agent he is, and that in doing business he signs his name M. T. Warne, Agent. While it may not be absolutely essential to describe, with minuteness, the true character or position of a party defendant, yet if he is so described, I do not think it is competent for him to make objections thereto. Especially is this view proper in a case like the present.

"The spirit of the complainant's bill shows clearly that his object in asking the aid of this Court is his fear of the ability of the defendant to respond to every proper allegation; and therefore, among other things, he charges the manner in which he carries on his dealings with his neighbors. Upon this view of the case, if upon no other, the allegation should stand.

"The motion to dissolve the injunction must be denied. It is quite plain to my mind from the circumstances of this case, as they appear in the bill and as they are sufficiently admitted in the answer, that the complainant should be protected from all interference upon the part of the defendant; that the book accounts which show the transactions of the complainant himself, and that the mail matter and other smaller packages which are directed by the customers of the concern

to the company, should be under the immediate control of the complainant. Upon this branch of the case I desire to avoid any intimation as to other rights between these parties; but I apprehend that I am not going too far and am expressing no judgment as to the ultimate views which shall control, in retaining the injunction in full force, as to the books of the concern, and as to all mail matter, and all packages whatsoever that may be shipped or sent to the company; costs allowed.

“But while this is so, the defendant Warne having since the termination of the contract between the complainant and himself, engaged in business in the name of the same company, the injunction should be so far modified as to protect him in all communications intended for him in his own undertaking. To see to it that no injustice is done I will appoint a person, indifferent between the parties, to receive all mail matter and all other matter addressed to said company, with powers to deliver all letters and other packages to the one who in his judgment is entitled thereto.

“There is an answer to this bill of complaint, and an answer by way of cross-bill also, under the rule, in and by which the defendant prays for the appointment of a receiver. I can discover no grounds to justify the Court in appointing a receiver. The original bill shows nothing to justify it, nor does the answer with the affidavits thereto annexed. Without going farther it appears that the assets of the company consisted chiefly in a few outstanding accounts, not many thousand dollars in all, and other material used in the management of said business, of comparatively little value in all; and it not appearing any where but that the complainant is abundantly able to respond to the defendant, for any moneys that may be due from the complainant to the defendant, so there would not seem to be any thing to justify the Court in adding the expense of a receiver to the cost of settling a business of such very limited proportions, when nothing else is in dispute between the parties but the right to take control and to manage such business. Costs allowed.” (John O. Wagoner v. Mark T. Warne.)

PATENTS.

An Inventor who Merely Describes his Device, and Produces Drawings of it, but does not Manufacture the Machine, or take out a Patent, Cannot Prevent a Subsequent Independent Inventor who First gets out a Patent, from Making and Selling the Article.—As early as the year 1870, Robert Allison conceived the idea of some improvements in rotary rock drills, one of which consisted, as described by the inventor, of “a single cylinder machine, with a hollow piston-rod, through which the drill passed, for drilling short holes.” He neglected to file an application for a patent until May 4, 1884, and meanwhile two patents were granted, one dated October 4, 1881, and the other November 1, 1881, to Albert Ball and George F. Case, issued on application made August 8, 1881, in which two patents, the improvements invented by Allison, were described and covered. The Pennsylvania Diamond Drill Company became the assignee of the patent granted on Allison’s application, and dated August 1, 1882, and filed a bill of complaint against Simpson and another for infringement of this patent, and another granted to Robert Frisbie February 17, 1874. The controlling question thus raised, said the United States Circuit Court, Western District of Pennsylvania, in considering the bill of complaint, was “one of rightful priority of invention, as between the Allison patent on the one hand and the Ball and Case patents on the other.” The circumstances were then commented upon as follows:

“The evidence now adduced shows that, in the year 1870, Allison made rough sketches of this device—some pencil sketches, and some with chalk, on a drawing-board—none of which, however, were preserved. But he made no model thereof and he never made the device itself. Beyond his rough sketches he advanced not a step. He did nothing to put his invention in a fixed and practical form. Indeed, in his testimony here, he states that he did not originally consider the invention of consequence enough to reduce it to a more permanent shape. He did not apply for a patent until many months after Ball

and Case had made the device and obtained their letters patent, and the market was being supplied with machines equipped with the patented device. * * * * *

Under the proofs, Ball and Case, undoubtedly, must be taken to have been original and independent inventors of the device in controversy. * * *

After completing their invention, Ball and Case were prompt to apply for letters patent, and by the Sullivan Machine Company, their assignee, were commendably diligent in furnishing the public with machines equipped with the device. As against the Ball and Case patents, then, will the law adjudge priority of invention to Allison? The answer is not doubtful under the authorities. In a race of diligence between two independent inventors, he who has first perfected and adapted the invention to actual use is entitled to the patent. Here Allison, it would seem, was the first to conceive the invention; but mere conception, which is not seasonably followed by some practical step, counts for nothing against a subsequent independent inventor, who, having complied with the patent laws, has obtained the patent. It would be a strange perversion of the purpose of the patent laws if one who has conceived of a new device, and proceeded so far as to embody it in rough sketches, or even in finished drawings, could there stop, and yet hold that field of invention against all comers for a period of twelve years. The law does not so reward supineness." (Pennsylvania Diamond Drill Company v. Simpson, 29 Federal Reporter, 288.)

Limitation of Action for Infringement.—In Federal Court not Subject to State Statute.—The question whether an action to recover damages for infringement of a patent is subject to the statute of limitations of the state wherein the suit is brought, has been the subject of conflicting decisions by the United States Circuit Courts. In that of the Northern District of Iowa (November term, 1886) the decision was that the state statute of limitations creates no bar. The Court said—"The right to a patent, and to the exclusive use of the rights conferred thereby, is wholly of federal creation, and the state cannot either extend or limit the time within which

an action for the protection of these rights may be brought under the federal statute." (May v. County of Buchanan, 29 Federal Reporter, 469. For conflicting decisions see Walker on Patents, Section 477.)

INVENTION OR DISCOVERY IS REQUIRED AS THE PROPER FOUNDATION OF A PATENT, AND WHERE BOTH ARE WANTING THE APPLICANT CANNOT LEGALLY SECURE THE PRIVILEGE.

(1 Cliff., U. S. Rep., 538.)

Novelty.—1. Letters patent, No. 48728, were granted John Searle, June 15, 1865, for an improved process for imparting age to wines, consisting in the introduction of heat, by causing the heating medium to pass through metallic pipes or chambers on the inside of the cask and within the body of the wine in the cask. Held, that it appearing by the evidence that the application of heat from outside the cask for such purpose, long antedated the issue of this patent, and that this process was identical in its effect with the other, it has no novelty.

Where it appeared that an apparatus like that patented by No. 48728, granted to J. Searle, June 15, 1865, had previously been used to heat other liquids in the same manner, there was no patentable invention in the apparatus thus applied to the heating of wine. (Dreyfus v. Searle, 8 Sup. Court Rep., 390.)

2. A patent obtained on a device already patented, in combination with another exactly similar but unnecessary device, which it required no invention to dispense with, there being no material difference in the mode of operation and result, presents no patentable novelty, and for that reason is void. (McClain v. Ortmyer, 33 Federal Reporter, 284.)

3. The second claim of specifications in letters patent, No. 144818, for an improvement in frames for horizontal engines, called for the combination of the guiding cylinder, base and trough-like connection. Held, that the novelty of these elements consisted solely in the form of the parts, and that the patent was not valid as regards such parts, as it covered not the form, but mechanical operation only. (Wright v. Yuengling, 33 Federal Reporter, 655.)

4. The seventh claim of letters patent, No. 122622, issued January 9, 1872, to William D. Mann for an improvement in compartment railway cars, describing an arrangement of wire signal-bells or apparatus to extend from each compartment to the porter's room, in view of the fact that such signals were in common use in hotels, on steamboats and elsewhere prior to the grant of letters patent, is void for want of novelty, as the mere change of location is not patentable. (Mann's etc. Car Company v. Monarch etc. Car Company, 34 Federal Reporter, 130.)

5. Letters patent, No. 269480, were granted for an improvement in composite pavements for either circular, square, or analogous depressions, equal or nearly equal in diameter in each direction, and with even or level margin on the pavement surface, adapted to afford an additional hold to the feet, and prevent slipping. Held, to possess patentable novelty, and to be infringed by a pavement made of slag cement, and a concrete of gravel and cement with a top-dressing of slag and cement, and finished with a roller which made impressions upon the surface. (Vulcanite Company v. American Company, 34 Federal Reporter, 320.)

6. The first claim of letters patent, No. 216973, of July 1, 1879, to Charles Radcliff, for "improvement in metallic buttons," is as follows: "A metallic button consisting of two disks, a crown and bottom-piece, in combination with a wire placed between them, so formed as to fit and strengthen the periphery of said disks, and to act as the bar for the thread, substantially as and for the purpose described." Held, void for want of novelty; buttons formed of an upper and lower disk, with an intermediate wire thread-bar, viz: the glove button, the Woodbury button, the Homish button, the Fernald button, and the Thalheimer button having been old at the date of the patent. (New Jersey Manufacturing Company v. Cooper, 34 Federal Reporter, 321.)

7. The fifth claim of letters patent, No. 252230, of January 10, 1882, to the Ligowsky Clay Pigeon Company, as assignee of George Ligowsky, for target traps, covers nothing more than a spring latch. Held, invalid, as not displaying invention, and the device being so old and well

known that the Court would take judicial cognizance of it without notice or proof. (*Ligowsky Clay Pigeon Company v. American Clay Pigeon Company*, 34 Federal Reporter, 328.)

8. The invention in letters patent, No. 313804, of March, 10, 1885, to the Ligowsky Clay Pigeon Company, as assignee of Jacob Bloom, for an improvement upon the Ligowsky "target trap" covered by letters patent, No. 252230, has for its object to provide that trap with a second and weaker spring, coiled, reversely to the throwing spring, about the head of the trap, within the drum, and concentric with the actuating spring, and so adjusted as to intercept the throwing lever in the radial movement when at about its maximum speed, and then, gradually checking the throwing arm, to return it to its position of rest. The violent recoil of the Ligowsky arm is thus obviated, and the target is discharged with greater certainty, and with less liability of breakage. Held, that the patent was valid, Bloom being the first to demonstrate, by reduction to practical use, the utility and value of the combination of the two concentric springs, not only in the head of the trap, but also to supply such a combination of the concentric springs, acting on different radii, in opposite directions, for any purpose whatever. (*Ligowsky Clay Pigeon Company v. American Clay Pigeon Company*, 34 Federal Reporter, 328.)

9. The fact that as soon as a patented improvement was made and introduced, its advantages over devices which had preceded it became manifest at once, and it commended itself to the public as a practical and desirable improvement, affords a safer criterion of inventive novelty than any subsequent opinion of an expert, or intuition of a judge. (*Palmer v. Johnson*, 34 Federal Reporter, 336.)

10. The plaintiff claimed under letters patent, No. 326357, issued to Jacob J. Unbehend, for a clasp, "a flexible tongue support consisting of two plates superimposed one upon the other, and connected together by a metallic band embracing the said plates at one end thereof." Also, "in a clasp, a flexible tongue support consisting of two plates provided with corresponding slots, and a metallic band passing through the said slots, and embracing the rear end portions of the plates

to tie the same together." Held, that the band described in these claims is not a patentable novelty. (Thomson v. Smith & Griggs Manufacturing Co., 32 Fed. Reporter, 791.)

For further cases as to the novelty of invention see *Munson v. City of New York*, 8 Sup. Court Reports, 622; *Smith v. Nichols*, 21 Wall., 112; *Dalton v. Jennings*, 93 United States, 271; *Johnson v. Flushing & N. S. R. Company*, 105 United States, 539; *Estey v. Burdett*, 109 United States, 633; *Western Electric Manufacturing Company v. Ansonia Brass, etc., Company*, 114 United States, 447; *Celluloid Manufacturing Company v. Zylonite Novelty Company*, 30 Federal Reporter, 617; *Landesman v. Jonasson*, 32 Federal Reporter, 590; *Filley v. Littlefield Stove Company*, 30 Federal Reporter, 434; *N. A. Iron Works v. Fiske*, 30 Federal Reporter, 775.

11. A manufacture or a product may be unpatentable for want of novelty, while the process producing it may be both new and useful. (23 Wall., 566.)

In cases of chemical invention, when the manufacture claimed is not a new composition of matter, but an extract from the decomposition or disintegration of substances, it is immaterial, in respect to its patentability, from what it has been extracted. If the substance was old the process of obtaining it from different materials may be patentable, but the product cannot be. (*America Wood P. Company v. Fiber Disintegrating Company*, 23 Wall., 566; *Cochrane v. Badische Anilin and Soda Fabrik*, 111 United States, 293.)

Invention.—1. Patents should be granted only for some substantial discovery or invention which adds to our knowledge, and makes a step in advance in the useful arts. The exercise of invention must be somewhat above the ordinary mechanical or engineering skill. (*Atlantic Works v. Brady*, 107 United States, 192; *Dunbar v. Meyers*, 94 United States, 187; *Pearce v. Mulford*, 102 United States, 112; *Wilson Packing Company v. Chicago Packing Company*, 105 United States, 566; *Phillips v. Detroit*, 111 United States, 604; *Hollister v. Benedict Manufacturing Company*, 113 United States, 59; *Western etc. Manufacturing Company v. Ansonia Brass etc. Company*, 114 United States, 447; *Yale Lock Manufacturing Company v. Greenleaf*, 117 United States, 554.)

2. Prior to March 7, 1876, the date of letters patent, No. 174465, to Alexander Graham Bell, for "improvements in telegraphy," it had long been believed by those experienced in the art, that, if the vibrations of the air caused by the voice in speaking could be reproduced at a distance by means of electricity, the speech itself would be reproduced and understood. Bell discovered that these vibrations could be electrically reproduced by gradually changing the intensity of a continuous current of electricity, so as to make it correspond exactly to the changes in the density of the air caused by the human voice. He then devised a way in which these changes of intensity could be made, and speech actually transmitted. Held, that discovery in finding this art, and invention in devising the means of making it useful, were both involved, and that the patent was properly issued under Revised Statutes of United States, § 4886, providing that "any person who has invented or discovered any new and useful art * * * * may obtain a patent therefor." (*Dolbear v. American Bell Telephone Company*, 8 Sup. Court Reports, 778.)

3. Claims 1 and 2 of patent, No. 281640, issued July 12, 1883, to Moses Mosler, upon an improvement in fire-proof safes, for an angle-bar for safe frames, consisting of a right-angled iron bar, one of the sides of which is cut away in a particular manner, whereby the uncut side may be bent to form a rounded corner, not limiting the claim to the precise lines of the cuts; and claims 1 and 2 of patent, No. 283136, issued August 14, 1883, to the same person, claiming a particular method of determining the lines for such cuts by the use of a certain pattern, the cutting of an opening in the web of an angle-bar to permit its bending, having been known and used before the patentee's invention, and the use of such patent not being new, are void for want of invention. (*Mosler Safe & Lock Company v. Mosler, B. & Co.*, 8 Sup. Court Reports, 1148.)

4. Patent, No. 273585, issued March 6, 1883, to Moses Mosler, upon an improvement in fire-proof safes, claiming the combination of round-cornered frames, sheet-metal cover bent around the top sides and lower corners, with projecting

metal bars forming rests for the bottom plate and a removable bottom plate; and Claim 3 of patent, No. 281640, issued July 17, 1883, to the same person, for the combination of front and back frames formed of single bent angle-bars cut in a particular manner so as to enable them to be bent to form rounded corners, and a metal sheet bent around and secured to such frames, the various elements of such combinations having been before known, except that the frames had previously been square, are void for want of invention; such claims constituting a mere aggregation. (*Mosler Safe & Lock Company v. Mosler, B. & Co.*, 8 Sup. Court Reports, 1148.)

5. "After a patent is granted for an article described as made by causing it to pass through a certain method of operation to produce it, as, in this case, cutting away the metal in a certain manner, the inventor cannot afterwards, on an independent application, secure a patent for the method or process of cutting away the metal and then bending it so as to produce the identical article covered by the previous patent, which article was described in that patent as produced by the method or process sought to be covered by taking out the second patent." (Opinion of the Court per Blatchford, J., p. 1151; *Mosler Safe & Lock Company v. Mosler, B. & Co.*, 8 Sup. Court Reports, 1148.)

6. The invention covered by letters patent, No. 126031, of April 23, 1872, to John J. Cowell, for an "improvement in sash-balances," relates to a cast metal pulley-box, and consists, in the second claim, in forming the box with two or more semi-tubular swellings, one at each end of the box, adapted to fit auger-holes bored in the frame for inserting the box. Held, that the improvement, though a very simple one, involved something more than ordinary mechanical skill, and that it showed inventive novelty in the saving of time and attention to details called for in the use of prior devices. (*Palmer v. Johnston*, 34 Federal Reporter, 336.)

7. The mere change in form of a soluble article of commerce, by reducing it to small particles so that its solution is accelerated and it is rendered more ready for immediate use, convenient for handling, and, by its improved appearance, more

merchandise, does not make it a new article, within the sense of the patent law.

To render an article new within that law it must be more or less efficacious, or possess new properties by a combination with other ingredients. (*Glue Company v. Upton*, 97 United States, 3; see also *West v. Roe*, 33 Federal Reporter, 45; *Hailes v. Albany Stove Company*, 8 Sup. Ct. Reports, 262.)

A PATENTABLE INVENTION MUST BE NOT ONLY NEW, BUT OF PRACTICAL UTILITY. (*Smith v. Nichols*, 21 Wall., 112.)

Utility.—1. A patent will not be declared void for want of utility at the instance of one who is deriving benefit by infringing upon its claims. (*La Rue v. Western Electric Company*, 31 Federal Reporter, 80.)

2. The fact that the particular instrument which Bell had, and which he used in his experiments, did not, under the circumstances in which it was tried, reproduce the spoken words so that they could be clearly understood, does not invalidate this patent; the proof being abundant, and of the most convincing character, that other instruments, carefully constructed, and made exactly in accordance with the specifications, did and will operate successfully, though not so perfectly as instruments made upon the principle of the microphone.

Anticipation.—1. In the apparatus made by Reis, of Germany, (who was himself anticipated by Bourseul) in 1860, with its several modifications, as described in his prospectus of 1865, and his catalogue of 1866, and also by Legat, Vanderweyde, Ferguson, and others, an intermittent or pulsatory current of electricity was employed; the transmitter, when actuated by the sound waves, making and breaking the current at each vibration. Held, that the apparatus was from its very nature unable to send and receive articulate speech, and that it was not an anticipation of letters patent, No. 174465, of March 7, 1876, to Alexander Graham Bell for "improvements in telegraphy," the essential elements of which are the employment of the undulatory, as contradistinguished from the pulsatory, current of electricity, to trans-

mit and copy air vibrations, corresponding exactly in amplitude, rate and form, to those produced by the human voice and the apparatus therefor. (*Dolbear v. American Bell Telephone Company*, 8 Sup. Court Reports, 778.)

2. An improvement in fire-proof flooring, the utility of which is sufficiently proven, though it does not involve a high degree of inventive faculty, constitutes a patentable novelty. (*Freyer v. Mutual Life Insurance Company*, 30 Federal Reporter, 787.)

3. In an action for the infringement of a patent, the defense of a lack of utility will not be sustained unless there is the clearest evidence that the invention claimed is utterly frivolous and worthless; and the fact that defendants have used it and infringed the patent is a strong argument against such defense. (*Kearney v. Lehigh Valley Railroad Company*, 32 Federal Reporter, 320.)

4. In letters patent for an improvement in bake-pans, the improvement is the uniting of a cluster of such pans to a plate, having an aperture for each pan, by a double-seam joint formed from the rim of the cup turned outward on the upper side of the plate. Held, the double-seam joint being peculiarly adapted to usefulness for the purposes intended by the patent, was, although not a new thing, new in this place, and that a wash-boiler having a bottom with two or four pits joined in the same manner was not so similar as to defeat the patent, under the principles laid down in *Railroad Company v. Truck Company*, 110 United States, 490; *Bell v. United States Stamping Company*, 32 Federal Reporter, 549.

5. The Cary invention (letters patent, No. 116266, dated June 27, 1871, granted to Alanson Cary for an improvement in furniture springs,) being based on the discovery that a single application of heat to hard drawn steel wire, weakened by winding into spiral forms, would restore its strength and elasticity, such application being novel, and producing a new and highly useful result, the process was patentable, notwithstanding previously heat had been applied to wire clock-bells and other articles, but for purposes and with results entirely different. (*Cary v. Lovell Manufacturing Company*, 31 Fed-

eral Reporter, 344; Cary v. Wolff, 24 Federal Reporter, 139; Mosher v. Joyce, 31 Federal Reporter, 557.)

6. A patent is not valid where the thing patented is not new, but has been previously known and used. (See Novelty under Patents.) (Western Electric Manufacturing Company v. Ansonia Brass etc. Company, 114 United States, 447.)

7. In a steam generator of that class in which the water is contained in a series of tubes inclined upward from the fire-front, active circulation of the water is necessary to success in making steam. The steam, therefore, is carried to a chamber above, but in its passage some water goes with it. If this water is allowed to fall back to the high end of the tubes from which the steam comes, the circulation is impeded. Crawford (letters patent, No. 90506, of May 25, 1869, to Benjamin Crawford,) made the ends of the tubes open into chambers at the high end to communicate with the steam-chamber above. He placed the reservoir of supply above, and communicating downward into the chambers at the lower end, and connected the lower part of the steam-chamber with this reservoir. This arrangement takes the water from the steam-chamber to the supply and into the circulation forward, and effectually prevents the obstruction which it would cause by being left to take the other cause. Held, not anticipated by English letters patent, No. 652, of 1863, to one Inglis; the water carried with the steam into the steam-chamber, or accumulated there by condensation, being liable in that improvement to find its way into the chamber at the lower end of the tubes, and to be drawn into the upward circulation through the tubes again, and to fall back the other way. (Babcock & Wilcox Company v. Pioneer Iron Works, 34 Federal Reporter, 338.)

8. Letters patent, No. 185027, issued December 5, 1876, to Thomas Holson for improvement in Jacquard looms, claim the construction of the griffs, or those parts which raise the hooks, of such breadth that when the griffs are elevated the blade still rests below the top of the hooks out of operation, and when the griffs descend the danger of striking the heads of these idle hooks is avoided. On evidence of the prior use

at Paterson and Brooklyn, of the British patent issued March 14, 1870, to John Morris for an improvement for making double-headed hooks so as to employ two cylinders for the center and border respectively, without changing the cards; of the French patent issued October 24, 1834, to James Bes-set, in which the Jacquard lifting-plate was replaced by a fixed grate and movable frame so that the horizontal needle, when opposite a full portion of a card, can withdraw the hook from the grate when the card cylinder is nearest the side of the machine, instead of when it is furthest, and of the publication in 1873 of "*Geschichte der Jacquard Machine*," the patent was held void for anticipation. (*Holson v. Uhlinger*, 34 Federal Reporter, 390; *Sharp v. Dover Stamper Company*, 103 United States, 250; *Forncrook v. Root*, 8 Sup. Court Rep., 1247.)

Infringement.—1. The use of a device doing the same work in substantially the same way, and accomplishing substantially the same result as another patented device, is an infringement of the patent; (*Shaver v. Skinner Manufacturing Company*, 30 Federal Reporter, 68) but patents for inventions are to receive a liberal construction to uphold, and not to destroy the right of the inventor. (*Turrill v. Michigan S. & N. I. R. Company*, 1 Wall., 491; *Providence Rubber Company v. Goodyear*, 9 Wall., 788; *Brown v. Guild*, 23 Wall., 181.)

2. The use of a patented combination, capable of being used for the purposes set out in the application, for another purpose, is an infringement; the applicant not being required to specify all the purposes for which his invention may be used. (*Cincinnati Ice Company v. Foss, Schneider & Co.*, 31 Federal Reporter, 469.)

Combinations.—1. When several patents exist for combinations, all producing the same results, but different in their forms of combination, the doctrine of equivalents has no application, and cannot be involved by one patentee to suppress the combination of another. (*Hill v. Sawyer*, 31 Federal Reporter, 282.)

2. To infringe a patent for a combination it is necessary to use each member of the combination, or its equivalent, substantially as set forth; and if the use of less than the whole

be an infringement, it is only where the part used, separate and apart from the rest not used, was new and patentable to the inventor. (*Thoens v. Israel*, 31 Federal Reporter, 556.)

3. The unauthorized use of any valid claim of a patent is an infringement for which the patentee is entitled to recover; but a person charged with the infringement of a combination patent must be shown to have used all of the devices or processes described in it. The use of one or more—less than all—will not constitute an infringement. (*Byerly v. Cleveland Linseed Oil Works*, 31 Federal Reporter, 73.)

4. Where a patent for fire-proof flooring consists of a certain combination of several parts, ultimately to be cemented together, the appropriation of the invention is complete before the parts are joined. (*Fryer v. Mutual Life Insurance Company*, 30 Federal Reporter, 787.)

5. The first and second claims of patent, No. 15995, granted to George W. Morse, October 28, 1856, for devices used in the operation of breech-loading military fire-arms, are not infringed by the manufacture of arms by the Winchester Repeating Arms Company, which are made under the Smith & Wesson patents of 1854, and the B. Tyler Henry improvements thereon, patented in 1860. In the Winchester gun the rim of its breech-block is not inserted into the barrel, as required in the first claim of the Morse patent, and it does not have the nippers, S, or radial hooks, operating in substantially the same way, as required in the second claim. (*Morse Arms Manufacturing Company v. Winchester Repeating Arms Company*, 33 Federal Reporter, 170.)

6. Where an invention was patented in Germany, and subsequently patented in the United States, and under the German patent laws a manufacturer in Germany had a right to practice the invention in Germany because he had made preparation to do so prior to the issue of the German patent, and for that reason the German patent was of no effect as against him, a purchaser in the United States purchasing from such manufacturer in Germany, has no right to sell the articles in the course of trade in the United States without license from the owner of the United States patent. (*Graff v. Boesch*, 33 Federal Reporter, 279.)

7. The reissue of a patent for soda-water fountains differed from the original by omitting the words in brackets: "I claim the tin vessel, A, incased by a [steel] cylinder, C, and ends, B, B, [soldered to the latter] in the manner as substantially described." The description called for end-caps without flanges, and secured to the cylinder by joints of pure tin. Defendants used end-caps, with flanges secured by joints of tin and lead solder and rivets. Held, no infringement, as, if the effect of omitting the words in the reissue was to cover the use of other solder than pure tin, the reissue was an enlargement and void. (*Mathews v. Iron-Clad Manufacturing Company*, 8 Sup. Court Reports, 639.)

8. A contract whereby complainant agrees not to sue defendant for any future infringements of its patents, in consideration of defendant's accounting for machines manufactured and paying a royalty thereon, is in substance and effect a license, and complainant cannot treat defendant as an infringer by reason of its refusal to account and pay royalties. (*Seibert Cylinder Oil Cup Company v. Detroit Lubricator Company*, 34 Federal Reporter, 216.)

For further cases illustrating the general subject of infringements see *Bliss v. Merrill*, 33 Federal Reporter, 39; *Railway Register Manufacturing Company v. Third Avenue Railroad Company*, 33 Federal Reporter, 31; *Good v. Bailey*, 33 Federal Reporter, 42; *Roosevelt v. Law Telephone Company*, 33 Federal Reporter, 505; *Kidd v. Horrey*, 33 Federal Reporter, 712; *Wright v. Yuengling*, 33 Federal Reporter, 655; *Wollensak v. Sargent*, 33 Federal Reporter, 840; *Michaelis v. Roessler*, 34 Federal Reporter, 325.

Damages.—1. Upon a bill in equity for the infringement of a patent where the defendants acted in good faith, the damages recoverable are the actual gains and profits of the defendants during the time their machine was in operation; and no damages can be inflicted by way of penalty. (*Livingston v. Woodworth*, 15 How., 546; *Reed v. Lawrence*, 39 Federal Reporter, 915.)

2. But where the wrong has been done under aggravated circumstances, the court has power, under the statute, to

punish it adequately by an increase of the damages. (*Dean v. Mason*, 20 How., 198.)

3. The value of an invention to the party using it is competent evidence on the question of damages for the infringement of a patent. (*Royer v. Coupe*, 29 Federal Reporter, 358.)

4. An infringer who has made large profits on a contract by use of a patented device, cannot refuse to respond therefor, or for any part thereof, on the ground that the owner of the patent, who is an assignee, is restrained by his contract with the patentee as to the amount which he may charge for the use of the patent, where he issued for an accounting in equity whatever bearing the stipulation in the assignment might have on the measure of damages in an action at law. (*Elizabeth v. American Nicholson Pavement Company*, 97 United States, 126.)

5. Damages of a compensatory character may be allowed to a complainant in an equity suit, where it appears that the business of the infringer was so improvidently conducted that it did not yield any substantial profits. (*Marsh v. Seymour*, 97 United States, 341.)

6. Where the claim infringed covers simply and only an improvement upon an existing machine, the damage recoverable as profits realized by defendant from sales of the infringing machine are not the amount realized from such sales, less the cost of manufacture of the machines sold, but only that part of defendant's profits which was derived from the use of the patented improvements. (*Fay v. Allen*, 30 Federal Reporter, 446.)

7. A patentee in whose favor a decree of infringement has been entered, is not entitled to an allowance for the loss sustained by him by reason of the division of sales of the patented article which he would have made but for the sales made by the defendant, when he fails upon the accounting to put in any evidence showing the cost of the articles. (*Cornely v. Neailwald*, 32 Federal Reporter, 292.)

8. The entire commercial value of machines made and sold by defendant was due to the use of a combination described in the 4th and 5th claims of the Dodge patent, which consisted

in a new combination of old elements, and not in a mere improvement upon certain prior machines. Held, in an action for infringement, that it was proper not to deduct from damages awarded the value of such prior machines. (*Fifield v. Whittemore*, 33 Federal Reporter, 835.)

9. Where a patented process for testing oils has been infringed, but it does not appear that defendant derived any profit from the use of the process, only nominal damages can be recovered, and the fact that oil manufactured by another company, in which the process was used, sold for a higher price than that of other manufacturers, who did not use it, is not sufficient to warrant more than such nominal recovery, unless it was also shown that such enhanced value, or some part of it, was due to the use of the process. (*Everest v. Buffalo Lubricating Oil Company*, 31 Federal Reporter, 742; see also *Roemer v. Simon*, 31 Federal Reporter, 41; *Bakes v. St. Johnsbury & Lake Champlain Railroad Company*, 32 Federal Reporter, 628.)

REAL ESTATE.

General Remarks.—Aliens cannot hold real estate and give good title thereto without first having filed their first papers declaring their intention to become citizens, and make affirmation and file the same with the secretary of state in the state where the property is situated, setting forth that they are about to acquire property, and that they have filed their declaration, etc.

Aliens under the same head cannot mortgage or lease real estate until they have complied with the above formalities and such as are required by the statutes of the state in which they are resident aliens.

And so the same difficulty would follow in the matter of dower of the wife of a resident alien or inheritance or devise under a will by the children of a resident alien.

Many special acts have been passed in order to prevent the lands of aliens escheating to the state in which they resided.

Deed may be Treated as a Mortgage.—The Supreme Court of Massachusetts has held, in a very brief opinion, that,

under the circumstances of the case before them, one whose real property was bought in at a legal rate by another person, on an oral agreement to allow the former to redeem it, might have relief, notwithstanding the statute of frauds. This question has been litigated in hundreds of cases, and not always (if we recollect right, not generally) with the same success. The actions which have failed have, we believe, usually been framed on the theory of endeavoring to establish a trust.

The characteristic feature of the Massachusetts case is that the circumstances were such that the Court could sustain the action as an action to redeem, by invoking the familiar principle that a deed absolute in form may, notwithstanding the statute, be shown to have been a mere mortgage. In the case at bar the owner obtained loans from the defendant's testator, and being indebted thereon, it was orally agreed between them that he should give defendant's testator a note on which the latter should sue; and the owner would make default, allowing testator to get judgment and execution, and sell, testator agreeing to bid in the property and hold it as security for the amount due. This arrangement was carried out, and the defendant's testator subsequently received rents and profits sufficient to pay the entire debt with interest and costs. Plaintiff's action was framed for an account, and to compel a conveyance by way of redemption.

The Court, in an opinion by Chief Justice Morton, after citing the familiar rule to which we have adverted, added, that it was decisive of the case at bar. For some reason, which does not appear to be fraudulent, he says the plaintiff did not directly convey the estate in question to the defendant's testator; he permitted the latter to obtain a judgment upon a debt in part fictitious, and to this get a title by a levy upon the execution, and also to foreclose by a sale under an existing mortgage. But the substance of the transaction was the same as if a deed had been directly given by the plaintiff. Both parties agreed that the title thus obtained was to be held solely as security for the debt to the defendant's testator, and a court of equity will treat the transaction according to its real nature, as a mortgage. (*Cullen v. Carey*, January 9, 1888, 15 North-Eastern Reporter, 131.)

RECEIVERS.

General Remarks.—Receivers appointed in the State Courts have no jurisdiction over the property of the corporation or person situated out of the state in which they were appointed. Receivers should be appointed in the states where the property respectively is in order to have jurisdiction and control over the same.

Receivers are appointed by the courts to take charge, collect, preserve, manage, and sell or otherwise dispose of property, the subject of or involved in actions or other proceedings pending; in dissolution of partnerships, corporations, banks, insurance and railways. The laws of the different states give them powers and control their actions; they must furnish bonds for the faithful performance of their acts in such amount and kind to be approved of by the court appointing them, and they are entitled to commission for their services dependent upon the value of the property held and administered by them.

Property Holden when Sold Subject to Liabilities.—A judicial decree authorized the issue, by a receiver, of certificates in a designated amount for the purpose of managing and operating a railroad, and directed that such certificates should be a first lien on the property of the road. The property and franchises of the corporation were sold “subject to the payment of the undue principal and interest” on such certificates. *Held*, that, as between the owners of such certificates and the purchasers, the latter were estopped from contesting the validity of the certificates, or questioning the amount for which the certificates were declared to be a lien upon the property purchased.

Such receiver's certificates are not commercial paper, and the holder takes them subject to all equities between the original parties, even though he acquires them for value and without notice; and when they are negotiated at a discount which the receiver is not authorized to allow, a *bona fide* holder will be protected only to the amount actually advanced by the first purchaser. (*Central National Bank v. Hazard*, 30 Federal Reporter, 484.)

Liability of Receivers to Suit.—"Receivers of property appointed in courts of the United States may be sued, in respect to any transaction or act connected with said property, without previous leave of the court appointing the receiver. Such suit is, however, subject to the general equity jurisdiction of such court, as far as the same shall be necessary to do justice." (Act of March 3, 1887, 24 Statutes, Chapter 373, § 3, p. 554.)

Power of Receiver to Make Contracts.—A case of considerable importance in the law of receivers is that of *Vanderbilt v. Little*, in the New Jersey Court of Errors. (The decision of the vice-chancellor, entitled *Lehigh Coal and Navigation Company v. Central Railroad Company*, 3 Central Reporter, 95; 14 Stewart's Eq., 167.) It is a case going far toward making the contracts of a receiver little more than precarious arrangements, dependent for continuance on the discretion of the Court. The decision has now been reversed in a decision of the Court of Errors and Appeals. (*Vanderbilt v. Little*, New Jersey, January, 1888, 10 Central Reporter, 849.)

That Court holds that contracts made by a receiver by virtue of such discretionary authority are, in some respects, *sui generis*; they bind the receiver not personally, but as the representative of the trust, and are to be enforced or redress for their breach is to be accorded out of the fund; but he who contracts with the receiver does so with the knowledge that, for any injury received thereby, he can only get redress by obtaining the permission of the Court, whose officer the receiver is, to sue at law, or to proceed against him in the Court of Chancery, and in either case by satisfying that Court that the claim is well founded.

Upon an application for redress upon such contracts, the determination of the Court is to be made on equitable principles adapted to the administration of an insolvent estate of this character. If, on examination, the contract appears to be improvident or detrimental to the trust, it should not be enforced, nor should damages for its non-performance be awarded. But if the contractor made the contract in ignorance of its improvidence, and has in good faith prepared to

perform it, and if by its non-performance he suffers actual loss without his fault, then the fund, the representation of which has misled him, ought to reimburse his actual loss. Accordingly when contracts for the purchase of goods, etc., have been orally made by a receiver, deliveries to his agents empowered to examine and certify whether such goods should be accepted, and the receipt and acceptance thereof upon such examination and certificate, and payment therefor, will satisfy the provision of Section 6 of the Statute of Frauds; and the contract will bind the fund if otherwise enforceable.

The Court were not, however, fully agreed on the grounds of decision. Magie, J., delivering the opinion of the Court, reviews the powers of a receiver and lays down the rules above stated.

Dixon, J., was in favor of stronger support to the contracts of receivers, acting under the statutory power by which receivers of railroad companies in New Jersey are empowered to operate the road for the use of the public subject at all times to the control of the chancellor. He says: "I regard this law as conferring directly upon the receiver the power to operate the railroad in his possession, and consequently to make all contracts necessary for its operation.

"Although in the exercise of this power the receiver is subject to the orders of the chancellor, yet the power is derived, not from the chancellor, but from the statute; and unless there is some order of the chancellor to curtail it, the power is as broad as the terms of the act make it. I see no adequate reason for placing this power upon a footing different from that upon which derivative powers to control stand generally; and I, therefore, think that all dealings of the receiver, which have the form of contracts, which are free from fraud, and which are within the scope of his statutory power, are valid contracts, and possessed of the usual incidents of contracts. * * * To hold that receivers of this class must go into the market for railroad supplies, with the understanding that the fairness of their contracts must be demonstrable to the chancellor whenever they are brought into question, or else they will not be obligatory upon the

receivers, or with the understanding that, on breach of the receivers of their contracts, the other contracting parties shall only be indemnified against actual loss, and shall not have such damages as they would be entitled to recover from other delinquent purchasers, seems to me to be a doctrine without solid foundation, either in reason or policy."

Duty to Answer to Suit.—In *Ryan v. Anglesea Railroad Company* (New Jersey, February, 1888, 10 Central Reporter, 887) it was held that where the receiver of an insolvent corporation has parted with all the property which he held in that capacity to the complainant in a suit to foreclose against the corporation, and is made a party defendant to such suit and called upon to answer, it is his duty to answer.

Until such receiver has been discharged from the receivership by the Court he will be deemed to still represent the interests committed to his care, so as to justify him in setting up as a defense in protection of those interests the absence of consideration for complainant's claim. (Compare *Herring v. New York, Lake Erie & Western Railroad Company*, 19 Abb. N. C.)

RIPARIAN RIGHTS.

Ownership.—1. The riparian proprietors of lands bounded on the Ohio river in West Virginia, own the fee in the lands to the low water-mark, subject to the easement of the public in that portion lying between high and low water-mark with the right of the State to control the same, for the purposes of navigation and commerce, without compensation to the owner. (*Barre v. Flemings*, (West Virginia) 1 South-Eastern Reporter, 731.)

2. When land lying on the Ohio river is conveyed by deed with general warranty, and calling for low water-mark on said river as one of its boundaries, the warranty is not broken by the fact that the public owns an easement therein, and the State, or one of its municipal corporations, has perpetually enjoined the purchaser from building a wharf or private landing on the land below high water-mark, without obtaining a license to do so. (*Barre v. Flemings*, (West Virginia) 1 South-Eastern Reporter, 731.)

3. Where, by the terms of a patent, land is bounded by a navigable river, the title extends no further than the edge of the stream, (*Serrin v. Grefe*, (Iowa) 25 North-Western Reporter, 227; *Wood v. Chicago, etc.*, 15 North-Western Reporter, 284; *Packer v. Bird*, (California) 11 Pacific Reporter, 873) and does not include an island, though the channel between that and the main land may not be navigable. (*Packer v. Bird, supra.*)

4. The rights of riparian owners are left to be settled by the principles of state law. (*City of St. Louis v. Meyers*, 5 Sup. Court Reports, 640; *Webber v. Pere Marquette Boom Company*, (Michigan) 30 North-Western Reporter, 469.)

5. The title to the soil under fresh water rivers, in a proprietary sense, is ordinarily in private parties, and the state, except under the exercise of the right of eminent domain, can interfere with such streams only for the purpose of regulating, preserving, and protecting the public easement. (*Woodruff v. N. B. Gravel Mine Company*, 18 Federal Reporter, 753, 785.)

6. In Kentucky a grant of land upon navigable waters vests the title to the soil *ad filum aquae* in the grantee. (*Williamsburgh Boom Company v. Smith*, 1 South-Western Reporter, 765.)

7. Ohio. (*Day v. Pittsburgh, Y. & C. Railroad Company*, 7 North-Eastern Reporter, 528.)

8. Michigan. (*Webber v. Pere Marquette Boom Company*, 30 North-Western Reporter, 469; *Fletcher v. Thunder Bay River Boom Company*, 16 North-Western Reporter, 647; *Cole v. Wells*, 13 North-Western Reporter, 813; *Richardson v. Prentiss*, 11 North-Western Reporter, 819; *Pere Marquette Boom Company v. Adams*, 6 North-Western Reporter, 857; *Toogood v. Hoyt*, 4 North-Western Reporter, 445.)

9. Wisconsin. (*Norcross v. Griffiths*, 27 North-Western Reporter, 609.)

10. The soil under the water of the inland lakes in Michigan does not belong to the general government or to the State, but to the riparian owners. (*Clute v. Fisher*, (Michigan) 31 North-Western Reporter, 614.)

11. The owner of the adjacent land has a qualified proprietary interest in the soil under the edge of the shore of a lake, so as to give him the right to construct and maintain a dock along the shore, and extending the necessary distance under the water; and when thus erected the dock is an appurtenance to the real estate. (*Tuck v. Olds*, 29 Federal Reporter, 738.)

12. The owners of land bounded by a river declared by Act of Congress to be a navigable stream, do not, upon a repeal of that Act, acquire title to the bed of the river. (*Chicago, B. & Q. Railroad Company v. Porter*, (Iowa) 34 North-Western Reporter, 286.)

13. A railroad company, lawfully constructing its road upon the bed of a navigable stream, thereby precludes riparian owners from acquiring title by accretion to land so formed, and lying between land appropriated by the railroad, and the new high water-mark of the river. (*Chicago, B. & Q. Railroad Company v. Porter*, (Iowa) 34 North-Western Reporter, 286; see also, for cases on general subject of ownership, *Trustees of Schools v. Schroll*, (Illinois) 12 N. E. Reporter, 243; *Steele v. Sanchez*, (Iowa) 33 North-Western Reporter, 366; *Turner v. Holland*, (Michigan) 33 North-Western Reporter, 283; *Babson v. Taintor*, (Maine) 10 Atlantic Reporter, 63; *Sewall etc. Company v. Boston Water Power Company*, (Massachusetts) 16 N. E. Reporter, 782; *State of Illinois v. Illinois Central Railroad Company*, 33 Federal Reporter, 730.)

14. The division of a strip of sea-shore between adjoining proprietors of land projecting into the sea, whose title papers fix definitely the division line of the upland, but not of the shore, should be made by a line running from the point of intersection between the division line of the upland and the high water-line perpendicularly to the low water-line. (*Morris v. Beardsley*, (Connecticut) 8 Atlantic Reporter, 139.)

15. The rule that accretions are to be divided by extending the lines of riparian owners at right angles with the middle thread of so much of the river as lies opposite the shore line is subject to modifications by special circumstances, and an instruction which fails to adapt the rule to the conditions of

the case at bar, is erroneous. (*City of Elgin v. Beckwith*, (Illinois) 10 N. E. Reporter, 558.)

16. Plaintiff and defendant were originally adjoining upland owners, but, by a change in the bed of a river, the adjoining portions of their land became submerged, after which the river gradually receded from plaintiff's land, and encroached on the land of defendant until it passed the original boundary. Held, that, by the submersion, the original lines ceased to exist, and plaintiff became a riparian owner, with all the accompanying rights of accretion and reliction. (*Wells v. Bailey*, (Connecticut) 10 Atlantic Reporter, 565.)

17. Whether the river was navigable or non-navigable, the plaintiff was entitled to all accretion to his land, though it extended in the first case beyond the original high water-line, or, in the second case, beyond the original center of the stream. (*Wells v. Bailey*, (Conn.) 10 Atlantic Reporter, 565.)

Alluvion is an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous. (*St. Clair Co. v. Lovington*, 23 Wall., 46.)

1. The test as to what is gradual and imperceptible is that although the witnesses may see from time to time that progress has been made, they could not perceive it while the progress was going on. (*St. Clair Co. v. Lovington*, 23 Wall., 46.)

2. The riparian right to future alluvion is a vested one. It is an inherent and essential attribute of the original property. The principle applies alike to streams that do, and to those that do not, overflow their banks, and where dikes and other defenses are, and where they are not necessary to keep the water within its proper limits. (*St. Clair Co. v. Lovington*, 23 Wall., 46.)

3. Land gained by alluvion or dereliction belongs to the adjoining owner. (*Jones v. Johnston*, 18 How., 150; *Banks v. Ogden*, 2 Wall., 57; *St. Louis Public Schools v. Risley*, 10 Wall., 91.)

4. Where a city has erected a wharf and landing on accretion, and leased them to private individuals, and the original proprietors are barred to recover the land by lapse of time, and presumption of dedication, they cannot recover the reve-

nues paid by such parties for the privileges, because such revenues result from the exercise of the public easement itself, and not from use independent thereof. (*Heirs of Leonard v. City of Baton Rouge*, (La.) 4 South-Western Reporter, 241.)

5. A city may construct permanent edifices of public advantage on accretion, and if a landing and wharf be erected by the city, the public use thereof is not destroyed because the premises are leased to private individuals. (*Heirs of Leonard v. City of Baton Rouge*, (La.) 4 South-Western Reporter, 241.)

Right to Ice.—The ice in a mill-pond is the property of the riparian owner, and he has the sole right to take it, subject only to the qualification that it is not to be taken in such quantities as to appreciably diminish the head of the water at the dam below. (*Searle v. Gardner*, (Pennsylvania) 13 Atlantic Reporter, 835.)

Accretions.—1. All grants of land bounded by fresh water rivers, where the expressions designating the water-line are general, confer the proprietorship and entitle the owner to accretion. The size of the river does not alter the rule, and it applies to so great and public a water-course as the Mississippi is at the city of St. Louis.

The doctrine that on rivers where the tide ebbs and flows, grants of land are bounded by ordinary high water-mark, has no application in such case. (*Jones v. Soulard*, 24 How., 41.)

2. Where an island is surveyed by the United States, and sold to a party who receives a patent therefor, such party is the owner of land formed by avulsion from the washing away of the upper part of the island, and the sudden formation of new land on the lower end thereof; and one cutting trees growing on the land so formed will be liable to the owner in trespass. (*Wiggenhom v. Kountz*, (Nebraska) 37 North-Western Reporter, 603.)

Use of Water.—A riparian proprietor is allowed to make a reasonable use and detention of the waters of a stream for domestic and other purposes; and whether such use and detention are reasonable or not, is a question of fact for the court. (*Stanford v. Felt*, (Cal.) 16 Pacific Reporter, 900.)

ROADS AND WAYS.

Highway.—Prescription.—1. Before a highway can be established by prescription, the general public under a claim of right, and not by mere permission of the owner, must have used some defined way, without interruption or substantial change, for twenty years or more, and a gate erected across the way, and maintained for and kept closed at certain stated times during a period of four years, by the owner evincing an intention to exclude the public from the uninterrupted use thereof, destroys any prescriptive right not already fully accrued. (*Shellhouse v. State*, (Indiana) 11 N. E. Reporter, 484; *Irving v. Ford*, (Michigan) 32 North-Western Reporter, 601; *Rube v. Sullivan*, (Nebraska) North-Western Reporter, 666, note; *Union Company v. Peckham*, (Rhode Island) 12 Atlantic Reporter, 130; *City v. Williams*, (Texas) 6 South-Western Reporter, 860; *Price v. Town*, (Missouri) 5 South-Western Reporter, 20; *Pavonia Land Association v. Temfer*, (New Jersey) 7 Atlantic Reporter, 423.)

2. What constitutes or evidences acceptance by the public. (*Morse v. Zeize*, (Minnesota) 24 North-Western Reporter, 27; *Laughlin v. City Wash.*, (Iowa) 19 North-Western Reporter, 819; *Kennedy v. Mayor*, (Maryland) 9 Atlantic Reporter, 234; *Hoadley v. City etc. San Francisco*, (California) 13 Pacific Reporter, 405; *People v. Lohfilema*, (New York) 5 N. E. Reporter, 784.)

3. By the common law the fee in the soil remains in the original owner where a public road is made upon it, but the use of the road is in the public. (*Barclay v. Howell*, 6 Pet., 498.)

4. While it is used as a highway the owner is entitled to the timber and grass which may grow upon the surface, and to all minerals which may be found below; and he may bring an action of trespass against any one who obstructs the road. (*Barclay v. Howell*, 6 Pet., 498.)

Obstructions.—For an obstruction to a public highway an injunction is not a favored remedy, whether sought by the public or an individual. To justify its issue at the suit of an individual the injury must be special, pressing, and otherwise

irremediable; and, as a condition to the issue of a permanent injunction, the right must either not be in controversy, or have been settled at law. (*Irwin v. Dixon*, 9 How., 10.)

Liability for Injuries.—1. A municipal corporation having the care and control of the streets is obliged to see that they are kept safe for persons and property, and to abate all nuisances; and if this duty is neglected, and any one is injured, it is liable for damages. (*Chicago v. Robbins*, 2 Black., 418; *Weightman v. Washington*, 1 Black., 39; *Nebraska City v. Campbell*, 2 Black., 590.)

2. The party in fault is concluded, as to the amount of damages, by a judgment against the corporation if he knew that the suit was pending. Express notice to him to defend the suit is not necessary. (*Chicago v. Robbins*, 2 Black., 418.)

3. The existence of obstructions in a street is such evidence of negligence as requires of the authorities explanation in order to escape liability. (*New York City v. Sheffield*, 4 Wall., 189.)

4. If a city or town has located a place as a public street, taking charge of it and regulating it, and an individual is injured in consequence of the negligent manner in which this is done, the corporation cannot, when it is sued for such injury, throw upon the party the proof of the regularity of the proceedings by which the land became a street, or of the authority by which the street was established. (*New York City v. Sheffield*, 4 Wall., 189.)

5. In an action against a city for an injury to plaintiff occurring by reason of an approach to a bridge being out of repair, the question whether the city has assumed such control of the approach as to make it responsible is an inference of fact to be drawn from all the testimony, by the jury, and not a question of law for the court. (*Manchester v. Ericsson*, 105 United States, 347.)

6. Where by the continued use of a street after dedication, the public has established a right thereto, the mere fact that an obstruction, not inconsistent with the use of the street as the wants of the public demanded, has been allowed to remain therein for more than ten years, will not, in the absence of any fraud, operate as the estoppel on the city in an action for

an abatement of the nuisance, even though the obstruction may have originally been built under a claim of right. (*City of Waterloo v. Union Mill Company*, (Iowa) 34 North-Western Reporter, 197.)

7. As to the duty of municipal corporations to keep their streets and sidewalks in good repair and safe condition, and their liability in damages for failure to perform such duties, see *Pomfrey v. Village of Saratoga Springs*, (New York) 11 N. E. Reporter, 43; *Hubbell v. City of Yonkers*, (New York) 10 N. E. Reporter, 858; *Bishop v. Township of Schuylkill*, (Pennsylvania) 8 Atlantic Reporter, 449; *Davis v. City of Jackson*, (Michigan) 28 North-Western Reporter, 526; *McGinty v. City of Keokuk*, (Iowa) 24 North-Western Reporter, 506, (note); *Hanscom v. City of Boston*, (Massachusetts) 5 North-Eastern Reporter, 251; *Grogon v. City of Worcester*, (Massachusetts) 4 North-Eastern Reporter, 230; *Veeder v. Village of Little Falls* (New York) 3 N. E. Reporter, 306, (note).

SALES.

What Evidence Required to Prove Fraud.—An action was brought to vacate and annul a sale of land made by A. to B., on the ground that it was executed and delivered for the purpose of hindering, delaying and defrauding creditors, and particularly C. in the collection of a debt owing to him by A. C. brought the action. It was proven that B. paid A. the full value of the land upon the transfer, but that it was made with the intent to hinder, delay and defraud C.

The payment by the purchaser of a fair consideration upon a sale of property affords strong evidence of the good faith of the transaction, and while not conclusive upon that question requires clear evidence of the existence of a fraudulent intent to overcome the presumption of honest motives arising from that fact. (*Billings v. Russell*, 101 New York, 226.)

One of the most prominent circumstances from which a fraudulent intent could be attempted to be deduced was the execution by A. on the same day, but after the delivery of the deed in question, of a chattel mortgage to his wife, con-

veying such property as he had remaining after the transfer of his land.

The fact that the mortgage was for a valuable consideration therefor, and that it was promptly recorded, are of sufficient materiality to contest the theory of fraud.

To ascertain with some accuracy as to the question of intent of fraud, all the circumstances attending the giving, receiving and keeping of the mortgage should be fully stated. (Nugent v. Jacobs, 103 New York, 125.)

Conditional or Installment Sales.—Vendor Reserving Title.—Sale Under Form of Lease.—R. bought an organ of H., giving in exchange a melodeon, and his note for the rest of the purchase money, in installments designated as “rent,” payable “with the understanding that if I shall have punctually paid all said rent, I shall be entitled to a bill of sale of the organ, and if I fail to pay any of said rent when due, all my rights herein shall terminate, and said H. may take possession of said organ.” The organ was returned, and H. sued to enforce payment of the note. This form of contract having been somewhat extensively adopted, for the purpose of securing the purchase money of sewing-machines, pianos and other personal property, the language of the Supreme Court and of other State Courts on the subject, will be of general interest. The Court said—“The real purpose was to sell the organ, with an agreement that the seller should not part with the title until the purchase money was paid. A careful inspection of the instrument shows that this must be so. It is not in the form and does not contain the usual stipulations of a lease. It is not signed by the lessor, and expresses but one agreement to be performed by him, and that is, *to give a bill of sale if the note is paid at maturity.* * * * We read the transaction therefore as a conditional sale. * * The plaintiff seems to treat it as a conditional sale by him but as an absolute purchase by the defendant; and the Court seems to have sanctioned that view. We think that view does not give effect to the real intention of the parties. * * * We think that the defendant understood that it was at his option to pay or not to pay the note.” (Hine v. Roberts, 48 Connecticut, 267.)

In *Singer Sewing-Machine Company v. Cole*, 4 Lea, the Tennessee Supreme Court made a like interpretation of a similar contract.

The Supreme Court came to an opposite conclusion in *Domestic Sewing-Machine Company v. Anderson*, 23 Minnesota, 57.

Sales of "Futures."*—*Advances to Protect Purchases of Cotton "Futures" on New Orleans Exchange.—Transactions held to be Wagers.—B., W. & Co., cotton factors and commission merchants in New Orleans, members of the Cotton Exchange, bought various lots of cotton for J. W. O., and advanced several sums of money to him to protect such purchases. The staple declining, and J. W. O. refusing to put up additional margins, the contracts were declared forfeited and closed out before maturity, and B., W. & Co. sued to recover their advances. J. W. O. asserted that there was a distinct understanding that no cotton was to be delivered, and that the object and intention was, as understood between the parties, to speculate in the rise and fall of the price of cotton. On the part of B., W. & Co. it was testified that every contract of purchase was made under the rules of the New Orleans Cotton Exchange, and for actual delivery of cotton, and could have been enforced if the cotton had been demanded; that there never was any understanding, either expressed or implied, that no cotton was to be delivered; that contracts for future delivery are very often sold many times before maturity, and a great many are forfeited, and many of them are settled upon maturity according to the difference in prices, but in all cases the cotton is actually delivered when demanded or tendered by either party, and which either party has a perfect right to. Among the evidence introduced was a letter from J. W. O. to B., W. & Co., saying—"If you buy or sell telegraph in some character, as it's against the law to deal in futures here" (Tennessee) B., W. & Co. also wrote to him advising—"when you get twenty-five points profit on any purchase, take in your profit. And when a depression occurs, go in again." The Tennessee Supreme Court said—"The only ques-

tion necessary to be considered is, were these wagering contracts, and was the money advanced in aid of them by the complainants with the knowledge that they were such? If so, they cannot recover, but if not they can. * * * * * I was inclined to the opinion that the complainant's right to recover was sustained by the preponderance of the testimony. But the chancellor and referees both came to a different conclusion, and the majority of the Court are of the opinion that all the evidence, taken together, establishes the defense set up, that these were wagering contracts in regard to the future price of cotton, and that complainants, knowing them to be such, advanced said sums of money in aid of them, and hence cannot be permitted to recover." (Beadles, Wood & Co. v. Ownby, 16 B. J. Lea, 424.)

Dealings in "Futures."—Intention to Deliver or Receive the Property.—How it must Appear.—Backhaus gave his note for \$1,000 to Bartlett & Mohr, but resisted payment, principally on the ground that it was given in settlement of an alleged balance due Bartlett & Mohr, on speculative sales of grain, made without any intention to deliver or receive the stuff, but solely to wager in the market price at the Milwaukee Chamber of Commerce. Was it necessary, in order to establish this defense, that B. should prove affirmatively, that there was no intention on either part to deliver or receive the grain?

A decision of the Supreme Court is cited as saying that B. must have made this proof. (Barnard v. Backhaus, 52 Wisconsin, 593.) And the Court indeed does say that "it does not matter what form the parties give their contracts, unless it appears affirmatively and satisfactorily that they were made with an actual view of the delivery and receipt of the grain, and not as an evasion of the statute of gaming or as a cover for a gambling transaction, they cannot be upheld." The county court was of opinion that Bartlett & Mohr in this case intended to sell actual wheat but the Supreme Court judges were not unanimous on the point. They finally agreed that at least some of the transactions were mere wagers, and therefore decided that Bartlett & Mohr could not recover on the note.

Right of Assignee to Sue in his Own Name.—Language Constituting a Promise to Pay.—S. & O., partners, had an account against P. S. bought out O.'s interest in the business, including the accounts, and telling P. that he had done this, asked for payment. P. replied that he understood the facts stated, that the account was larger than he supposed, but he would come in and pay S. On being again dunned, he named a day on which he would call and settle. The question was, whether S. could sue in his own name on the assigned partnership account. The Supreme Court answered that he could, by reason of the debtor's promise to pay him. The question then was, whether P.'s language amounted to such a promise, and the Court said—"The language used by the defendant (P.) must be construed with reference to the facts and subject-matter about which he was talking. He then knew that the claim was the property of the plaintiff (S.) and must have known that the plaintiff demanded payment as owner. With that knowledge and understanding he made the promise relied on; and it seems clear that the promises were in fact and in legal effect promises to pay to the plaintiff alone." (Simonds v. Pierce, Vermont Supreme Court, 1879.)

Loaning for Special Purpose not Delivery in Sale.—Rose owned a span of horses which he sold to Bruley, payment to be made in work, which was done substantially as agreed. Bruley, however, on a general settlement, was found to owe Rose \$45.60. To secure it Rose claims that Bruley delivered the horses to him as a pledge. Bruley denied this, but it was undisputed that he took the horses from Rose's farm, and as the evidence indicates with Rose's consent to his taking them for the particular purpose of going to Haydens, eight miles westerly. Bruley, however, did not go there but started easterly, in the night, with his family and household goods. The Court held that Rose had not released his lien as pledgee, that he had a special property in the horses, and that in an action for malicious prosecution by Bruley against Rose, on the ground of a false charge of larceny, the Court below erred in instructing the jury that Bruley was not guilty of larceny. (Bruley v. Rose, Iowa Supreme Court.)

Wrongful Sale by Party in Possession.—A. employed B. to buy a horse for him. B. paid for it with A.'s money, but took the bill of sale in his own name. A., knowing the circumstances, permitted B. to remain in possession of the horse and bill of sale, which he showed to C., and selling him the animal, took the price and absconded. The question was, whether A. could recover the horse from C., and the Court answered that having clothed B. with all the indicia of title, he could not. (Nixon v. Brown, 57 New Hampshire, 34.)

Seller (Vendor) may Sue Purchaser (Vendee) without Tendering Goods if the Latter Notifies the Former not to Ship.—An important case confirming the long contested principle that an anticipatory refusal to perform a contract may amount to an absolute breach before the time of performance is found in Windmuller v. Pope, (New York Court of Appeals, December, 1887, 9 Central Reporter, 882.) The Court here held that on a contract for a sale of goods, where the vendee notified the vendor that he would not receive the goods nor pay for them, and informed the vendor that if he forwarded the goods he would do so at his own peril, and advised him that he had better stop attempting to carry out the contract, the vendor is justified in treating the contract as broken by the vendee at that time, and may bring his action immediately for the breach of it, without tendering the delivery of the goods or awaiting the expiration of the period of performance fixed by the contract; and the vendee cannot retract his renunciation of the contract after the vendor has acted upon it and has sold the goods to other parties.

A somewhat similar principle was involved in Robinson v. Frank (9 Central Reporter, 846) in the same Court, November 29, 1887. Here the Court held that where one of the parties to an executory contract, ceases and refuses to manufacture machines agreed to be manufactured under the contract, and so notified the other party or his agent, and such refusal is absolute and total, and is not withdrawn, the other party is justified and excused for his omission to make any further demands, or to serve any other notices, required by the contract.

In *White v. Barber* (United States Supreme Court, December, 1887) a principal sued his brother under circumstances the gist of which appears to be that the latter, in fulfilling the former's orders, had put up margins as security, which were thereby subjected to the rules of the Board of Trade; and the principal then repudiated his contract as illegal and demanded immediate return of his margins. The broker was threatened with expulsion for non-payment pursuant to his principal's instructions, and having waited till the principal had unsuccessfully attempted to enjoin the Board of Trade, the broker yielded to the rules of the Board and paid over the margin in satisfaction of the contracts which his principal had repudiated. The Court held that he was protected in so doing.

SHIPPING.

Variation Between Charter-Party and Bill of Lading.—Charter-Party Controls.—"On the 11th of January, 1886, at Middlesbro'-on-Lees, England, the steamship Chadwicke was chartered to Bolckow, Vaughan & Co., to take on board 1,300 tons of spiegel iron, etc.," and "being so loaded therewith to proceed to the Port of New York, Perth Amboy, Jersey City, Hoboken or Brooklyn, and there deliver the same as ordered on arrival." The charter, however, provided that the vessel was "to be addressed to the freighter's agent at the port of discharge, the captain to sign bills of lading as presented, without prejudice to this charter." Three days afterward, the cargo having been put on board, a bill of lading in the common printed form was signed by the master, stating the steamer to be "bound for New York," and that the cargo was to be delivered "at said port of New York * * * unto C. L. Perkins, Esq., 30 Pine street, or his assigns, * * * and all other conditions as per charter-party;" the port and consignee's name being written in the usual blank spaces. The steamer arrived at the quarantine station of the port of New York on the 5th of February, 1886, where a telegram from Mr. Perkins to the master dated January 30th, was awaiting his arrival, and was received by the master, directing the steamer to Lehigh Valley

Railroad dock at Perth Amboy. Instead of going thither he came up the New York bay, anchored off the Battery, reported to Mr. Perkins, the charterer's agent in New York, demanded to be unloaded there according to the terms of the bill of lading, and refused to go to Perth Amboy. After the charter had been signed, Bolckow, Vaughan & Co. informed Mr. Perkins by telegram about the option contained in the charter. Thereupon the agent obtained an advance of fifty cents per ton upon a contract then pending, in consideration of the delivery of 1,000 tons of the iron at Perth Amboy instead of "ex ship" at New York. The option was worth to Bolckow, Vaughan & Co. precisely \$500. The statement of facts thus far are nearly *verbatim* from the opinion of Judge Brown, in the admiralty case of Bolckow, Vaughan & Co., Limited, v. The Chadwicke, (Southern District of New York, 1887, 29 Federal Reporter, 521,) the libel having been filed to recover damages against the vessel, for refusing to go to Perth Amboy to unload, as ordered on arrival at New York. Judge Brown in delivering judgment proceeded to say:

"The claimants contend that the bill of lading, in making the port of New York the place of delivery, determined the charterer's option, and that he had no right afterwards to direct the vessel elsewhere. Perth Amboy is a different port, and in a different collection district from New York, although not much further from quarantine, where the master first received his notice, than are the ordinary discharging berths for such cargo in the port of New York. The consular invoices sworn to by the libellants, before the consul at Middlesbro,' declare that the cargo was shipped for New York and designed to be entered there. * * * The master in preparing his manifest stated New York as the only port, and entered his vessel at the New York custom house.

"The disposition of the cargo was evidently intended to be left to the charterer's agent in New York. All the other places of alternative delivery named in the charter are in the immediate vicinity of New York. There is not the slightest reason to suppose that the shipper in making out the consular invoices and the bill of lading for 'the port of New York' actually intended either to waive his option as to the place

of final delivery, or to charge himself with any irregularity in a delivery at Perth Amboy, should that be directed by his agent, even if he knew that Perth Amboy was in a different collection district from New York, which he probably did not know. * * * The intent of the whole instrument seems clear that the vessel was to be consigned to New York for further orders—a familiar form of charter—except that in this case the option was limited to a few places within the immediate vicinity of the primary port.

“The bill of lading must be construed in the same sense, and as designed to indicate the port of New York as the primary port only, where C. L. Perkins would direct the place of final delivery according to the option provided for in the charter. No doubt the bill of lading omits what ought to have been inserted in it in order to make its provisions literally harmonious with the charter, and to make the whole intent clear from that paper alone; and some of the ordinary printed language of the bill of lading should also have been stricken out. Such incompatibilities of expression between the charter and the bill of lading are not infrequent where the charterer’s goods are laden on board. Often the two papers wholly fail to be adjusted nicely to each other. A bill of lading referring to a charter-party is never construed as intending to express the whole intent, or to control the charter-party in consequence of mere inharmonious expressions. The charter is the deliberate and controlling document; and where the intent of the charter is clear, a bill of lading under it, and referring to it, as between the ship and the charterer, does not supersede the express provisions of the charter-party that are clearly intended to apply to the situation, however inartificially the bill of lading may be framed. * * * To control the charter-party there must be sufficient evidence of a new contract between the parties *pro tanto*. In this case there is no evidence of any further or different contract.” There was, accordingly, a decree for the libellants.

Demurrage.—Variant Terms in Charter-Party and Bill of Lading.—Explanation by Parol.—In a charter-party of the bark *Wanderer*, fifteen days were allowed for loading and

discharging the cargo. All but two of these days were consumed in loading at Stettin. The bills of lading, signed afterwards, contained the words on the margin, "three working days are left for discharging;" and at the bottom of the bills, above the signature of the master, were these words: "The cargo to be discharged for account of the merchant within three working days, crew to assist, if more time used, demurrage to be paid as per charter-party." On arrival at Charleston the master of the *Wanderer* refused to bear the expense of discharging cargo, and the consignee claiming that the master should do so, and waiving none of his rights, had the cargo discharged by a stevedore and paid the bill—\$129.25. This amount he claimed to deduct from the freight money, for which the ship-owners filed a bill in the United States District Court, eastern district of South Carolina. The Court pointed out the variant terms of the charter-party and the bill of lading, saying: "The charter-party provided that the cargo should be taken in and discharged in fifteen working days, and also that the expense of discharging should be borne by the ship; the cargo 'to be taken from along-side at expense and risk of the merchant.' The bill of lading says: 'The cargo to be discharged for account of the merchant within three working days, crew to assist.' Whom? The ship? Is not this within the scope of their employment? Then why insert it? * * * Thus an ambiguity exists which calls for explanation. Mr. Greenleaf, discussing the rule as to the admissibility of parol evidence upon the subject-matter of written instruments, says: 'Where the agreement in writing is expressed in short and incomplete terms, parol evidence is admissible to explain what is *per se* unintelligible, such explanation not being inconsistent with the written terms.' * * * Applying this rule, and admitting this testimony, it appears that while the ship was at Stettin the fifteen days allowed in the charter-party for loading and discharging cargo had almost expired; that in fact but two days remained. This exposed the charterer to demurrage at the rate of about eight pounds per day. In this condition of things it was proposed that three working days should at all events be allowed for discharging cargo; that

in consideration of this indulgence, the ship should be relieved of its obligation to deliver cargo at its own cost, but that the crew should assist in this discharge—the burden, however, being assumed by the merchant. In order to carry out this, these words were added to the bill of lading—words inconsistent with the charter-party and calling for explanation. In the light of this testimony the meaning and use of the words are explained.” It was accordingly ordered that the ship-owner should recover the full freight money due without offset. (The Wanderer, 29 Federal Reporter, 260.)

Delivery at Wharf.—Whether Ship is Bound to Deliver at Her Own Dock, or may go Elsewhere in Port.—Thirty-six cases of goods shipped by the National Line Steamer Egypt to Arnold, Constable & Co., of New York, were carried by that vessel to the Inman Line Pier, No. 39 North River, instead of the National Line Pier, No. 36, and having been landed on Pier 39, were there destroyed by fire, January 31, 1883. The bill of lading stipulated that the carriers should have the privilege of discharging “without notice at the consignee’s risk.” Notice of the time and place of discharge was in fact given by a bulletin posted at the custom house. Messrs. Arnold, Constable & Co. filed a libel *in personam* against the owners of the National Line to recover the value of the goods, and among other things alleged that it had become an established custom and usage of the port, between the libellants and respondents, that all the libellants’ goods should be landed at the dock known as the “National Dock,” which at this time was at Pier 39; that the change to Pier 36 was made without necessity, in violation of said custom; and that it was by reason of such violation that the goods were destroyed.

The case was tried in the District Court for the Southern District of New York, and Judge Brown, in giving judgment, said that the alleged custom, in order to have the legal effect of a stipulation to deliver at Pier 39, “must be so clearly proved, and also so certain in its character, as to have the legal effect of one of the express terms of the contract. In my judgment, the proof is entirely insufficient in either respect.” The opinion proceeds to describe the custom of the line in

discharging, which was in a great majority of instances to employ their own dock. It was shown that "during the five years preceding the arrival of the Egypt, out of one hundred and ninety-two voyages from Liverpool made by steamers of the defendants' line, in eight instances only had the vessels been sent to docks other than those leased or controlled by the defendants. "While these facts show, undoubtedly," said the Court, "the habit of defendants to discharge at their own dock, this practice was in no way legally incompatible with a lawful discharge at any other fit and appropriate wharf, whenever there was reasonable occasion for so doing. * * *

The question presented is whether the customary discharge of goods by a carrier at its own wharf, so long as no good reason for a discharge elsewhere exists, though not without occasional discharges for cause at a different wharf, imports any strict contract obligation to discharge at its own wharf, and not elsewhere, though good reason for a discharge elsewhere does arise, for the reasonable convenience of all parties, so that the contract must be held violated by a discharge made at another place near by equally fit and appropriate. In my judgment there is no such obligation." In a previous part of the opinion it was said: "The bill of lading in this case stipulated only for a delivery at the port of New York. Under this provision the defendants had a right to deliver the goods in any part of the port in which, by the usage of trade, such goods were accustomed to be delivered." (*Arnold v. National Steamship Co.*, (1886,) 39 Federal Reporter, 184.)

Bottomry or Disbursement Drafts.—Nature of the Lien.—Points of Interest to Ship-Agents, Brokers and Bankers.—Instances have occurred which serve to warn ship-brokers and agents, as well as bankers, that the common practice of advancing money to ship-masters upon what are known as bottomry or "disbursement" drafts is sometimes attended with risks, which, whether unsuspected or not, are at least often unprotected. The money is advanced in such cases upon the supposition that the advance by virtue of the language of the draft or otherwise creates a lien upon the vessel. The following is the form of a draft of this description:

Master of

The general maritime law seems to hold that the power of

the master to create a lien on the vessel and freight, either by bond or by draft, is governed by the law of the country to which the ship belongs, and that it is incumbent upon the creditor before making advances, to ascertain whether by that law the master has this power. The maritime laws of nearly all countries, however, confer this right in case of urgent necessity. Some of them are not so strict as the English and American decisions in requiring previous communication between the master and the owner. Thus the law of Germany (Article 634 of the Commercial Code) expressly obliges the master in cases of urgent necessity not only to hypothecate the vessel, but even the cargo, for the purposes of its preservation, or the prosecution of the voyage. The German law also seems to contemplate a draft being given instead of a bottomry bond, as it permits the instrument to be made payable to order, and to pass by indorsement; and if no express date of payment is fixed, it becomes payable on the eighth day after the arrival of the vessel in the port of destination. The German code itself speaks of the bottomry security as *Bodmereischuld* and *Bodmereibrief* (Article 609)—terms which would apply to a draft quite as well as to any other form of instrument.

The point of deepest interest in this summary is that which imposes upon the holders of these drafts the necessity of proving that the money was actually expended for account of the ship, and that the expenditure was such as to carry with it the right of a maritime lien. In the case of the *Woodland*, cited above, the expenditure was incurred in part, and nominally *in toto*, for necessary repairs of a British ship in St. Thomas. There were three drafts, two of which were in the hands of a *bona fide* holder, who libelled the ship in this district. A third draft was given by the ship-agents to the master, corruptly, and constituted a part of the sum for which the others were drawn against the ship. Chief Justice Waite rendered the opinion, and said: "The drafts themselves did not create a lien on the vessel. Unless the debt for which they were given bound the vessel, the drafts, notwithstanding what is expressed on their face, did not."

TELEGRAPH MESSAGES.

Liability for Errors in Transmission.—Requirement that Messages Shall be Repeated.—The validity of a condition made by telegraph companies that they will not be liable beyond a certain designated amount for errors in transmitting messages, unless they are repeated—that is, sent back from the station at which they are received to the station from which they are originally sent—has been the subject of conflicting decisions in different states. In Ohio it has been settled in the highest court that such a stipulation cannot absolve a telegraph company from the consequences of its own negligence. In the case decided, S. W. C. left a message at Woodstock, Ont., for transmission to G. & D., Cleveland, Ohio, asking if they would give “one fifty for twenty-five hundred at London”—meaning \$150 per bushel for that amount of flaxseed at London, Ont. The message was delivered with the words “one fifty” altered to “one five.” G. & D. accepted in the following terms: “Yes, if the seed is prime, and we can hold at London until spring.” Upon the receipt of this reply G. W. C. bought the seed at \$1.45 per bushel, and shipped it in the latter part of January. G. & D. received and paid for the seed, and then brought an action against the telegraph company for damages caused by their erroneous transmission of the message. The company set up in defense the special agreement limiting their liability for messages not repeated, but in the Cuyahoga Common Pleas there was a verdict against them for \$1,290.61. The judgment was affirmed in the Supreme Court, which said that in failing to use the care and skill which the law required of those who exercise a public employment, they became “liable for the resulting consequences, notwithstanding their stipulation to the contrary.”

* * * We are also of the opinion that the failure to transmit and deliver the message in the form or language in which it is received is *prima facie* negligence, for which the company is liable; and that to exonerate itself from the liability thus presumptively arising, it must show that the mistake was not attributable to its fault or negligence.” (Western Union Telegraph Company v. Griswold, 37 Ohio State Reports.)

On the last point the Court cited concurrent decisions in Maine, New York, Illinois, Michigan, Louisiana, Indiana and Iowa.

Telegraph Companies.—Failure to Deliver Message.—Damages.—Cipher Dispatch.—H. Brothers sued a telegraph company for damages suffered by them by reason of its negligence to deliver a message sent to them. They were merchants and ship-brokers at Pensacola, and they received a cablegram from their correspondent and agent at Barbadoes, giving them the refusal to carry some timber, to which they replied that they could send a vessel to carry the timber at a certain freight, and their correspondent answered accepting the terms; but this message the company failed to deliver. These dispatches were in cipher. As the acceptance was not received, H. Brothers declined the offer of a vessel by M., and on the arrival of their letters they received a copy of the telegram, and were forced to recharter the vessel at a loss of \$618.90. The company defended on the ground that it was liable for nominal damages, since it had not been informed that the dispatch was an important one, which should be correctly transmitted and promptly delivered; but a judgment for \$618.90 was given against it, and the case (Western Union Telegraph Company) was carried to the Supreme Court of Florida, where it was affirmed. The Chief Justice, McWhorter, in the opinion, said: "1. The courts of New York, Minnesota, Maryland, Wisconsin, Massachusetts, Nevada and Maine, have decided that in such a case as this nominal damages only can be recovered; but in Alabama and California it is held that a telegraph company is liable for damages resulting naturally and in the usual course of business, from its failure to send or deliver a dispatch correctly and promptly, without requiring the sender to disclose its importance to the company. We are of the opinion that full damages should be given. The common carrier charges different rates of freight for different articles, according to their bulk or value and their respective risks of transportation, and provides different methods for the transportation of each. It is not shown here that the defendant company had any scale of prices which were higher or lower as the importance of the

dispatch was great or small; and it is not shown that had the importance of correct and prompt transmission and delivery been communicated to the operator that the rules of the company required him to send the dispatch out of its order, or with an extra degree of skill or different method or agency. There was then no reason that any such statement should have been made to the operator. It seems to be considered that the relations between telegraph companies and their customers must be determined by some settled rules of law; but any attempt to apply to so novel a system legal principles adapted to pursuits and occupations which are dissimilar in their nature, and designed for the accomplishment of different purposes, must naturally result in failure and confusion. A recognition of their courts of this truth, and an application, from time to time to its conduct, of such rules and regulations as common sense may suggest as fitted to its peculiar nature and purposes, without reference to systems which are not similar, and principles that are not analogous, is the only method of preserving the law regulating its operation from contradiction and perplexities. Similar difficulties have previously arisen in other branches of the law, when from their novelty and a failure of applicable precedents the courts, probably from the fear of the hazard of framing new rules, or misled by a seeming analogy, have attempted to apply to such legal novelties long-used principles of law, and to analogize the new to some old system with which they are familiar.

2. It is of no consequence in determining the question here whether the dispatch was in plain English or in cipher, provided the cipher is written in the letters of the English alphabet."

Telegraphic Delay.—Action for Damages.—The decision of the Supreme Court of the United States in *Western Union Company v. Hall*, applies a distinction of much importance, not only in actions against telegraph companies, but in other classes of actions where it is sought to recover for loss of profits. The plaintiff below telegraphed to his agent to buy ten thousand barrels of petroleum, and if the message had been duly delivered and the order executed and the plaintiff

had sold the petroleum next day, he would have realized, by the advance which had taken place meantime, eighteen hundred dollars. To recover this sum he sued. The company insisted that his actual loss was only the toll paid. The Court below sustained the action for the full amount, and this decision the Supreme Court reversed. Judge Matthews says, in substance, that the only theory on which the plaintiff could show actual damage or loss is on the supposition that if he had bought on November 9 he might and would have sold on November 10. It is clear that in point of fact he has not suffered any actual loss. It does not appear that it was the purpose or intention of the sender of the message to purchase the oil in the expectation of profits to be derived from an immediate resale. If the order had been promptly delivered on the day it was sent and had been executed on that day, it is not found that he would have sold the next day at an advance, nor that he could have resold at a profit at any subsequent day. The only damage therefore which he is entitled to recover is the cost of transmitting the delayed message.

To somewhat similar affect is the recent case of *Riley v. Western Union Company*, (39 Hun, 158.)

This decision is not to be understood, it would seem, as holding that such a loss of opportunity cannot be recovered for, for the Court appear to put their decision on the omission from the plaintiff's case of certain facts which in some instances might be supplied. But it goes at least to the extent of warning the practitioner that to recover for such loss of opportunity there should be evidence that the order would have been executed if received, and that plaintiff would have sold at a profit or that the advance was sustained, or, we may add, that he was obliged to buy the article at an advance for the purpose for which he had sent the order. (Compare *Goodsell v. Western Union Company*, 53 Superior Court, J. and S., 46; *Carr v. Archimedean Company*, 12 Daly, 332; *Barretts & v. Wharton*, 101 New York, 631.)

The question whether a party can prove what he would have done in a contingency that did not take place is one that is frequently contested, and which would be involved in

attempting such proof. The authorities are not quite harmonious, but the better opinion is that when a question of right depends on an act which a party might or might not have performed in such a contingency, his testimony that as to whether he would or would not have performed it is competent. A useful authority on this point is *King v. Fitch*, where it was held that in seeking to avoid a sale of chattels on account of fraud, the fact that the seller would not have made the sale except for false representations may be shown by the direct testimony of the seller, if he be a competent witness, because this is not a matter of opinion, but the statement of fact within his personal knowledge. (2 Ab. Ct. App., Dec., 508.) To similar effect is *Valton v. National Loan Fund Society*, 4 id., 437. Contra, *Learned v. Ryder*, 61 Barb., 552; S. C., 5 Lans., 539.

TRADE-MARKS.

General Remarks.—In *Pratt's Appeal* (Supreme Court of Pennsylvania, 16 Wash. L. Reps., 73), the following points of interest in the law of trade-marks were decided:

1. When a person has acquired the right to use a certain symbol as a trade-mark, an imitator of it will not be protected by the mere act of adding his own name to the label. Such addition is a circumstance and nothing more, to be considered in connection with the whole appearance of the trade-mark, to determine whether it is an imitation.

2. If the children or other descendants of the owner of a trade-mark continue the manufacture of the goods after their ancestor's death, using upon them the same trade-mark, they acquire a right to it independently of any that might accrue to them by descent. In such a case the question as to the descendibility of trade-marks does not necessarily arise. There is, however, ample and recent authority for saying, not only that a business and its accompanying trade-mark may pass from a parent to his children without administration, but that the business may be divided among the children, and each will have a right to the trade-mark to the exclusion of all the world except his co-heirs.

TRADE UNIONS AND CONTRACTS.

Trade Combinations and Conspiracies.—A Remedy at Law for Acts in Restraint of Lawful Business.—The branch pilots of New Orleans having formed an organization, agreed that they would not do service as pilots with any persons not members of their union, and a member of pilots, part owners of the pilot-boat Mary E. Lee, having undertaken to act independently, the confederated pilots endeavored by suits, newspaper publications and divers other means, to drive them out of the business. These injurious acts the pilots of the Mary E. Lee sought an injunction to restrain, and obtained one from the United States Circuit Court. The Supreme Court, however, reversed the decision, and in the following language pointed out the remedy :

“The whole gist of the complaint is that the defendants do not treat the plaintiff as having a right to use his vessel as a pilot-boat, and have publicly so stated, and that some of the parties mentioned have been subjected to suits for their acts in piloting. But if this be so, the plaintiff has a full remedy for his alleged wrongs in the courts of law. They furnish no ground for the interposition of a court of equity. If the plaintiff has a right to pilot vessels with his boat through the pass and is wrongfully interfered with by the defendants or others, he can prosecute them for the wrong. If his vessel is arrested in its passage, without lawful warrant, he can bring the defendants before the courts to answer for their conduct. If his pilots are duly licensed, and they are hindered or prevented from the exercise of their business, both he and they have the same means of redress which are afforded to every citizen whose rights are invaded or obstructed.” (Francis v. Flinn, 118 United States, 385.)

Contracts in Restraint of Trade.—Exhaustively Considered by the Court of Appeals, New York, Reviewing the Whole Subject.—Appeal from judgment of the General Term of the Supreme Court in the first judicial department, made March 20, 1885, which modified as to an additional allowance of costs, and affirmed, as modified, a judgment in favor of plaintiff, entered upon a decision of the Court on trial at Special Term.

This action was brought to restrain the defendant from engaging in the manufacture or sale of friction matches in violation of a covenant in a bill of sale executed by defendant, which is set forth in the opinion, wherein also the material facts are stated.

ANDREWS, J.—Two questions are presented. First, whether the covenant of the defendant contained in the bill of sale executed by him to the Swift & Courtney & Beecher Company on the 27th day of August, 1880, “that he shall and will not, at any time or times within ninety-nine years, directly or indirectly engage in the manufacture or sale of friction matches (excepting in the capacity of agent or employe of said The Swift & Courtney & Beecher Company), within any of the several states of the United States of America or in the territories thereof, or within the District of Columbia, excepting and reserving, however, the right to manufacture and sell friction matches in the state of Nevada and in the territory of Montana,” is void as being a covenant in restraint of trade; and, Second, as to the right of the plaintiff, under the special circumstances, to the equitable remedy by injunction to enforce the performance of the covenant. There is no real controversy as to the essential facts. The consideration of the covenant was the purchase by the Swift & Courtney & Beecher Company, a Connecticut corporation of the manufactory No. 528 West Fiftieth Street, in the city of New York, belonging to the defendant, in which he had, for several years prior to entering into the covenant, carried on the business of manufacturing friction matches, and of the stock and materials on hand, together with the trade, trade-marks and good will of the business, for the aggregate sum (excluding a mortgage of \$5,000 on the property, assumed by the company) of \$46,724.05, of which \$13,000 was the price of the real estate. By the preliminary agreement of July 27, 1880, \$28,000 of the purchase price was to be paid in the stock of the Swift & Courtney & Beecher Company. This was modified when the property was transferred August 20, 1880, by giving to the defendant the option to receive the \$28,000 in the notes of the company or in its stock, the option to be exercised on or before January 1, 1881. The remainder of

the purchase price, \$18,724.05, was paid down in cash, and subsequently, March 1, 1881, the defendant accepted from the plaintiff, the Diamond Match Company, in full payment of the \$28,000, the sum of \$8,000 in cash and notes, and \$20,000 in the stock of the plaintiff, the plaintiff company having, prior to said payment, purchased the property of the Swift & Courtney & Beecher Company and become the assignee of the defendant's covenant. It is admitted by the pleadings that in August, 1880 (when the covenant in question was made), the Swift & Courtney & Beecher Company carried on the business of manufacturing friction matches in the states of Connecticut, Delaware and Illinois, and of selling the same "in the several states and territories of the United States and in the District of Columbia;" and the complaint alleges, and the defendant in his answer admits, that he was at the same time also engaged in the manufacture of friction matches in the city of New York, and in selling them in the same territory. The proof tends to support the admission in the pleadings. It was shown that the defendant employed traveling salesmen, and that his matches were found in the hands of dealers in ten states. The Swift & Courtney & Beecher Company also sent their matches throughout the country wherever they could find a market. When the bargain was consummated, on the 27th of August, 1880, the defendant entered into the employment of the Swift & Courtney & Beecher Company, and remained in its employment until January, 1881, at a salary of \$1,500 a year. He then entered into the employment of the plaintiff, and remained with it during the year 1881, at a salary of \$2,500 a year, and from January 1, 1882, at a salary of \$3,600 a year, when a disagreement arising as to the salary he should thereafter receive, the plaintiff declining to pay a salary of more than \$2,500 a year, the defendant voluntarily left its service. Subsequently he became superintendent of a rival match manufacturing company in New Jersey, at a salary of \$5,000, and he also opened a store in New York for the sale of matches other than those manufactured by the plaintiff. The contention by the defendant that the plaintiff has no equitable remedy to enforce the covenant, rests mainly on the fact that

contemporaneously with the execution of the covenant of August 27, 1880, the defendant also executed to the Swift & Courtney & Beecher Company a bond in the penalty of \$15,000, conditioned to pay that sum to the company as liquidated damages in case of a breach of his covenant.

The defendant for his main defense relies upon the ancient doctrine of the common law first definitely declared, so far as I can discover, by Chief Justice Parker (Lord Macclesfield) in the leading case of *Mitchell v. Reynolds* (1 P. Williams, 181), and which has been repeated many times by judges in England and America, that a bond in general restraint of trade is void. There are several decisions in the English courts of an earlier date in which the question of the validity of contracts restraining the obligor from pursuing his occupation within a particular locality were considered. The cases are chronologically arranged and stated by Mr. Parsons in his work on *Contracts* (vol. 2, p. 748, note). The earliest reported case, decided in the time of Henry V., was a suit on a bond given by the defendant, a dyer, not to use his craft within a certain city for the space of half a year. The judge before whom the case came indignantly denounced the plaintiff for procuring such a contract, and turned him out of court. This was followed by cases arising on contracts of a similar character, restraining the obligors from pursuing their trade within a certain place for a certain time, which apparently presented the same question which had been decided in the dyer's case, but the courts sustained the contracts and gave judgment for the plaintiffs; and, before the case of *Mitchell v. Reynolds* it had become settled that an obligation of this character, limited as to time and space, if reasonable under the circumstances and supported by a good consideration, was valid. The case in the Year Books went against all contracts in restraint of trade, whether limited or general. The other cases, prior to *Mitchell v. Reynolds*, sustained contracts for a particular restraint, upon special grounds, and by inference decided against the validity of general restraints. The case of *Mitchell v. Reynolds* was a case of partial restraint and the contract was sustained. It is worthy of notice that most, if not all, the English cases which assert the doctrine that all

contracts in general restraint of trade are void, were cases where the contract before the court was limited or partial. The same is generally true of the American cases. The principal cases in this State are of that character, and in all of them the particular contract before the court was sustained. (*Nobles v. Bates*, 7 Con., 307; *Chappel v. Brockway*, 21 Wend., 157; *Dunlop v. Gregory*, 10 New York, 241.) In *Alger v. Thacher* (19 Pick., 51), the case was one of general restraint, and the Court, construing the rule as inflexible that all contracts in general restraint of trade are void, gave judgment for the defendant. In *Mitchell v. Reynolds* the Court, in assigning the reasons for the distinction between a contract in general restraint of trade and one limited to a particular place, says, "for the former of these must be void, being of no benefit to either party and only oppressive;" and later on, "because in a great many instances they can be of no use to the obligee, which holds in all cases of general restraint throughout England, for what does it signify to a tradesman in London what another does in Newcastle, and surely it would be unreasonable to fix a certain loss on one side without any benefit to the other." He refers to other reasons, viz: The mischief which may arise (1) to the party, by the loss, by the obligor, of his livelihood and the subsistence of his family; and (2) to the public, by depriving it of a useful member and by enabling corporations to gain control of the trade of the kingdom. It is quite obvious that some of these reasons are much less forcible now than when *Mitchell v. Reynolds* was decided. Steam and electricity have, for the purposes of trade and commerce, almost annihilated distance, and the whole world is now a mart for the distribution of the products of industry. The great diffusion of wealth and the restless activity of mankind striving to better their condition, has greatly enlarged the field of human enterprise and created a vast number of new industries, which give scope to ingenuity and employment for capital and labor. The laws no longer favor the granting of exclusive privileges, and, to a great extent, business corporations are practically partnerships, and may be organized by any persons who desire to unite their capital or skill in business, leaving a free field to

all others who desire for the same or similar purposes to clothe themselves with a corporate character. The tendency of recent adjudications is marked in the direction of relaxing the rigor of the doctrine that all contracts in general restraint of trade are void irrespective of special circumstances.

Indeed, it has of late been denied that a hard and fast rule of that kind has ever been the law of England. (*Rousillon v. Rousillon*, 14 L. R., Ch. Div., 351.) The law has, for centuries, permitted contracts in partial restraint of trade, when reasonable; and in *Homer v. Graves* (7 Bing., 735), Chief Justice Tindall considered a true test to be "whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public." When the restraint is general, but at the same time is co-extensive only with the interest to be protected, and with the benefit meant to be conferred, there seems to be no good reason why, as between the parties, the contract is not as reasonable as when the interest is partial and there is a corresponding partial restraint. And is there any real public interest which necessarily condemns the one and not the other? It is an encouragement to industry and to enterprise in building up a trade, that a man shall be allowed to sell the good will of the business and the fruits of his industry upon the best terms he can obtain. If his business extends over a continent, does public policy forbid his accompanying the sale with a stipulation for restraint co-extensive with the business which he sells? If such a contract is permitted, is the seller any more likely to become a burden on the public than a man who having built up a local trade only, sells it, binding himself not to carry it on in the locality? Are the opportunities for employment and for the exercise of useful talents so shut up and hemmed in that the public is likely to lose a useful member of society in the one case and not in the other? Indeed, what public policy requires is often a vague and difficult inquiry. It is clear that public policy and the interests of society favor the utmost freedom of contract, within the law, and require that business transactions should not be trammelled by unnecessary restrictions. "If," said Sir George Jessell in *Printing*

Company v. Sampson (19 Eq. Cas. L. R., 462), "there is one thing more than any other which public policy requires, it is that men of full age and competent understandings shall have the utmost liberty of contracting, and that contracts when entered into freely and voluntarily, shall be held good and shall be enforced by courts of justice." It has some times been suggested that the doctrine that contracts in general restraint of trade are void, is founded in part upon the policy of preventing monopolies, which are opposed to the liberty of the subject, and the granting of which by the king under claim of royal prerogative led to conflicts memorable in English history. But covenants of the character of the one now in question operate simply to prevent the covenantor from engaging in the business which he sells, so as to protect the purchaser in the enjoyment of what he has purchased.

To the extent that the contract prevents the vendor from carrying on the particular trade, it deprives the community of any benefit it might derive from his entering into competition. But the business is open to all others, and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. Such contracts do not create monopolies. They confer no special or exclusive privilege. If contracts in general restraint of trade, where the trade is general, are void as tending to monopolies, contracts in partial restraint, where the trade is local, are subject to the same objection, because they deprive the local community of the services of the covenantor in the particular trade or calling and prevent his becoming a competitor with the covenantee. We are not aware of any rule of law which makes the motive of the covenantee the test of the validity of such a contract. On the contrary we suppose a party may legally purchase the trade and business of another for the very purpose of preventing competition, and the validity of the contract, if supported by a consideration, will depend upon its reasonableness as between the parties. Combinations between producers to limit production and to enhance prices, are or may be unlawful, but they stand on a different footing. We cite some of the cases showing the tendency of recent judicial opinion on the general subject. (*Whittaker v. Howe*, 3 Beav.,

383; Jones v. Lees, 1 Hurl. & N., 189; Rousillon v. Rousillon, *supra*; Leather Company v. Loursout, 9 Eq. Cas., L. R., 345; Collins v. Locke, 4 App. Cas., L. R., 674; Oregon Steam Company v. Winsor, 20 Wall., 64; Morse v. Morse, 103 Massachusetts, 73.) In Whittaker v. Howe a contract made by a solicitor not to practice as a solicitor "in any part of Great Britain," was held valid. In Rousillon v. Rousillon a general contract not to engage in the sale of champagne, without limit as to space, was enforced as being under the circumstances a reasonable contract. In Jones v. Lees, a covenant by the defendant, a license under a patent, that he would not during the license make or sell any slubbing-machines without the invention of the plaintiff applied to them, was held valid. Bramwell, J., said: "It is objected that the restraint extends to all England, but so does the privilege." In Oregon Steam Company v. Winsor the Court enforced a covenant by the defendant, made on the purchase of a steamship, that it should not be run or employed in the freight or passenger business upon any waters in the state of California for the period of ten years.

In the present state of the authorities we think it cannot be said that the early doctrine that contracts in general restraint of trade are void, without regard to circumstances, has been abrogated. But it is manifest that it has been much weakened, and that the foundation upon which it was originally placed has, to a certain extent at least, by the change of circumstances, been removed.

The covenant in the present case is partial and not general. It is practically unlimited as to time, but this, under the authorities, is not an objection, if the contract is otherwise good. (Ward v. Byrne, 5 M. & W., 548; Mumford v. Gething, 7 C. B. (N. S.), 305, 317.) It is limited as to space since it excepts Nevada and Montana from its operation, and therefore is a partial and not a general restraint, unless, as claimed by the defendant, the fact that the covenant applies to the whole of the State of New York, constitutes a general restraint within the authorities. In Chappel v. Brockway, (*supra*), Bronson, J., in stating the general doctrine as to contracts in restraint of trade, remarked that "contracts which go to

the total restraint of trade, as that a man will not pursue his occupation any where in the State, are void." The contract under consideration in that case was one by which the defendant agreed not to run or be interested in a line of packet-boats on the canal between Rochester and Buffalo. The attention of the Court was not called to the point whether a contract was partial, which related to a business extending over the whole country, and which restrained the carrying on of business in the State of New York, but excepted other states from its operation. The remark relied upon was *obiter*, and in reason cannot be considered a decision upon the point suggested. We are of the opinion that the contention of the defendant is not sound in principle, and should not be sustained. The boundaries of the states are not those of trade and commerce, and business is restrained within no such limit. The country, as a whole, is that of which we are citizens, and our duty and our allegiance are due both to the state and nation. Nor is it true, as a general rule, that a business established here cannot extend beyond the state, or that it may not be successfully established outside of the state. There are trades and employments which, from their nature, are localized; but this is not true of manufacturing industries in general. We are unwilling to say that the doctrine as to what is a general restraint of trade depends upon state lines, and we cannot say that the exception of Nevada and Montana was colorable merely. The rule itself is arbitrary, and we are not disposed to put such a construction upon this contract as will make it a contract in general restraint of trade, when upon its face it is only partial. The case of *Oregon Steam Company v. Winsor*, (*supra*,) supports the view that a restraint is not necessarily general which embraces an entire state. The defendant entered into the covenant as a consideration in part of the purchase of his property by the Swift & Courtney & Beecher Company, presumably because he considered it for his advantage to make the sale. He realized a large sum in money, and on the completion of the transaction became interested as a stockholder in the very business which he had sold. We are of opinion that the covenant, being supported by a good consideration,

and constituting a partial and not a general restraint, and being, in view of the circumstances disclosed, reasonable, is valid and not void.

In respect to the second general question raised, we are of opinion that the equitable jurisdiction of the court to enforce the covenant by injunction was not excluded by the fact that the defendant, in connection with the covenant, executed a bond for its performance, with a stipulation for liquidated damages. It is, of course, competent for parties to a covenant to agree that a fixed sum shall be paid in case of a breach by a party in default, and that this should be the exclusive remedy. The intention in that case would be manifest that the payment of the penalty should be the price of non-performance, and to be accepted by the covenantee in lieu of performance. (*Phoenix Insurance Company v. Continental Insurance Company*, 87 New York, 400, 405.) But the taking of a bond in connection with a covenant does not exclude the jurisdiction of equity in a case otherwise cognizable therein, and the fact that the damages in the bond are liquidated does not change the rule. It is a question of intention, to be deduced from the whole instrument and the circumstances; and if it appear that the performance of the covenant was intended, and not merely the payment of damages in case of a breach, the covenant will be enforced. It was said in *Long v. Bowring* (33 Beav., 585), which was an action in equity for the specific performance of a covenant, there being also a clause for liquidated damages, "all that is settled by this clause is that if they bring an action for damages the amount to be recovered is £1,000, neither more nor less." There can be no doubt upon the circumstances in this case that the parties intended that the covenant should be performed, and not that the defendant might at his option repurchase his right to manufacture and sell matches on payment of the liquidated damages. The right to relief by injunction in similar contracts is established by numerous cases. (*Phoenix Insurance Company v. Continental Insurance Company*, *supra*; *Long v. Bowring*, *supra*; *Howard v. Woodward*, 10 Jur. N.S., 1123; *Coles v. Sims*, 5 De G., McN. & G., 1; *Avery v. Langford*, Kay's Ch., 663; *Whittaker v. Howe*, *supra*; *Hubbard v. Miller*, 27 Mich.)

There are some subordinate questions which will be briefly noticed.

First.—The plaintiff, as successor of the Swift & Courtney & Beecher Company, and as assignee of the covenant, can maintain the action. The obligation runs to the Swift & Courtney & Beecher Company, “its successors and assigns.” The covenant was in the nature of a property-right and was assignable, at least it was assignable in connection with a sale of the property and business of the assignors. (*Hedge v. Lowe*, 47 Iowa, 137, and cases cited.)

Second.—The defendant is not in a position which entitles him to raise the question that the contract with the Swift & Courtney & Beecher Company was *ultra vires* the powers of that corporation. He has retained the benefit of the contract and must abide by its terms. (*Whitney Arms Company v. Barlow*, 68 New York, 34.)

Third.—The fact that the plaintiff is a foreign corporation is no objection to its maintaining the action. It would be repugnant to the policy of our legislation and a violation of the rules of comity to grant or withhold relief in our courts upon such a discrimination. (*Merrick v. Van Sautvoord*, 34 New York, 208; *Hibernia National Bank v. Lacombe*, 84 id., 367; Code of Civil Procedure, § 1779.)

Fourth.—The consent of the Swift & Courtney & Beecher Company to the purchase by the defendant of the business of Brueggemann, did not relieve the defendant from his covenant. That transaction was in no way inconsistent therewith. Brueggemann was selling matches manufactured by the company, under an agreement to deal in them exclusively.

There are some questions on exceptions to the admission and exclusion of evidence. None of them present any question requiring a reversal of the judgment.

There is no error disclosed by the record and the judgment should, therefore, be affirmed.

All concur, except Peckham, J., dissenting.

Judgment affirmed.

(*The Diamond Match Company v. Roeher*, 106 New York Court of Appeals, decided in 1887.)

TRUSTS AND TRUSTEES.

When Trustee Cannot Purchase.—A trustee may not, as such, purchase property in which he has an individual interest. The law, in such a case, does not stop to inquire whether the transaction was fair or unfair, but, when the relationship is disclosed, sets aside the transaction, or refuses to enforce it at the instance of the beneficiary under the trust.

The law prevents fraud by making them, as far as may be possible, knowing that real motives often elude the most searching inquiry, and it leaves neither to judge nor jury the right to determine upon a consideration of its advantages or disadvantages, whether a contract made under such circumstances shall stand or fall.

The strictness of this rule gives it one of its chief uses as a preventive or discouraging influence, because it weakens the temptation to dishonesty or unfair dealing on the part of trustees, by vitiating, without attempt at discrimination, all transactions in which they assume the dual character of principal and representative.

This rule is observed in the House of Lords. (*Aberdeen Railway Company v. Baikee and others*, 2 Eq., 1281.)

This is a general equitable rule. (2 Johns. Chan., 251, 252; 103 New York, 58 *et seq.*)

This rule is on all fours in the cases of directors and officers of corporations.

When Trustee Liable for Loss of Funds.—The will of A. made B. and C. the executors and trustees. A. and B. had been partners up to the time of A.'s death. B. continued the business. A. directed a portion of the trust to be invested separately for the use and benefit of his daughter. B. kept the books, papers and accounts of the estate of A. in his possession. The money which was realized by the estate was put by B.'s direction into his new firm with the knowledge of C., his co-trustee and executor, and interest was paid therefor. No portion was set apart for the daughter of A. as the will directed. The firm of B. failed, and the funds of the estate of A. were swallowed up in the loss.

The responsibility for this loss falls on B. and on C. C. was

equally liable with B. for not attending to the proper investment of the estate's money as directed in the will; and if C. had not actual knowledge that B. had used the trust money in his business, still he could have inquired, as was his duty, as to what use the funds were put to; he is liable for his negligent conduct in not doing so. He should, at best, have made an attempt to see the funds of the estate properly invested. C., at law, is not the wrong-doer, and therefore not chargeable for the loss with interest on the losses calculated with annual rests but with simple interest. C.'s failure to make a separation of the trust fund did not induce the conversion or loss of the fund by B. (*Wilmerding v. McKesson*, 103 New York, 329.)

Trustee when Liable for Signing Reports.—A., as trustee of a corporation, joined in making an annual report, which stated that the capital stock of the corporation had been paid up in full.

In an action by a creditor of the corporation, to recover of the trustees signing the report, the amount of his claim, on the ground that such statement was false, to the knowledge of the signers, it appeared that the stock of the corporation was issued to one B. in payment for certain undeveloped mining property.

The property had been purchased by B. of another corporation in which A. was a stockholder. A. received from B. \$10,000 of the stock of the new company, given to him without consideration to enable him to act as trustee.

B. surrendered to the new company one thousand shares of the stock, which was pledged, with \$70,000 of the corporate bonds, to secure a loan of \$35,000, and gave five hundred shares as a commission to the officer who negotiated the loan. The property was proved to be worth not over \$60,000. It was sold to B. for \$1,000,000 of stock and \$200,000 of bonds of the new company, and in his deed to that company the consideration expressed was \$600,000. Of all of which facts it was shown that A. had knowledge.

It was decided and held that from these facts that A. signed the report in bad faith, knowing it to be false. (*Blake v. Griswold*, 103 New York, 429.)

Who Entitled to Benefits of Increase of Securities of Trusts.—

The will of A. gave to his executors money in trust, with directions to invest the same in certain specified interest-bearing obligations, to pay "the annual interest, income and dividends thereof" to his daughter, during her life, and upon her death, leaving no issue, to divide "the principal or capital sum aforesaid" among his other children. With the consent of all the parties interested, a portion of the fund was invested in securities other than those named, but all of them, by their terms, drew fixed rates of interest, payable annually. A sale of the securities after the death of the daughter (who had an interest for life) resulted in a surplus over the amount of the original investment. Upon a settlement of the accounts of the trustees, it was decided that the surplus was an accretion to the fund, and that the remaining children were entitled to the same, for there are no other persons lawfully entitled to receive it.

This case is not analogous to those where a division is sought to be made on the gain or profit on investments in trade or in corporations.

There the will directed a certain and fixed rate of interest. The testator did not want any change in the trust securities.

An increase in value of bonds would not go to the legatee of the interest but to the ultimate owner of them. (*In re Gerry*, 103 New York, 445.)

Trustee's Obligations on Testator's Contracts.—1. By the terms of a will certain trusts were created to a certain amount of which the executors of the will were the trustees. The testator held a mortgage upon real estate in another state, which, previous to his death, was foreclosed and at the sale he bought in the property; but before taking the deed therefor he died. The executors were obliged and did take title. They effected a sale of this property at the best terms they could obtain, and took in part payment a mortgage for the purchase money. This mortgage was foreclosed but the full amount was not realized. These trustees were sought to be charged with this deficiency on their individual liability, but it was decided that, in the absence of any evidence

impeaching their good faith, they were not liable; that as executors they were at law obliged to carry out the contract of their testator. As a general rule, trustees residing in, and deriving authority from a will executed in one state may not invest trust funds in mortgages upon real estate out of the state. In this case they were obliged to purchase and had to sell, and did so on the best terms obtainable. The mortgage was held by them as trustees. (*In re Denton v. Sanford*, 103 New York, 607.)

2. Where a will authorizes the executors to continue the business of their testator for as long a time as they in their best judgment deem advantageous to the estate, and where they had instructions as to the distribution of the profits, and to hold in trust the rents and interest first to deduct the expense and charges, and to pay out to certain beneficiaries the residue and net proceeds, they are entitled to charge or credit themselves for outlays made or losses sustained by bad debts, the cost of repairs and replacing old articles necessary to conduct the business. That the same should be deducted from the income of the beneficiaries for life. It was not necessary that the will should specifically state what purchases should be made or what expenses were to be incurred, so long as the language of the same gave the executor general authority to conduct the business, including the meeting of losses and expenses, including ordinary expenses for repairs and improvements proper in their nature. (*In re Jones*, 103 New York, 621.)

Fiduciary Accounts.—Payments to Trustee.—A deposit account in the name of A. B., trustee for C. D., or “assignee of E. F.,” or “administrator of G. H.,” may be drawn against by A. B., signing his individual name alone.

The New York Court of Appeals has gone to the extent of holding that a bank may pay to H. I., administrator of A. B., a deposit made by A. B. as trustee for C. D. The Court said —“It may not be doubted that if the intestate (A. B.) in her life-time had demanded the money of the bank and had presented her pass-book, no claim by the beneficiary having been interposed, the bank would have been bound to pay; and this

for the reason that such was their express contract. What the trust was they neither knew nor were bound to inquire.”

Removal of a Trustee for Cause.—Appeal from judgment of Special Term, dismissing complaint.

The complaint in this action was dismissed upon the ground that it did not state facts sufficient to constitute a cause of action.

The plaintiff and the defendant McFadden were co-partners in business when the partnership expired by limitation. The partners agreed to dissolve. The articles of dissolution provided for the sale of the goods excepted and the division of the proceeds. The outstanding accounts were to be collected by one White, and the proceeds deposited in the Pacific Bank, and afterward paid over in equal amounts to McFadden and the plaintiff. White was given a power of attorney to carry out the provisions of the articles of dissolution. It is alleged by the plaintiff that White has not carried out the agreement; and the plaintiff therefore asks that the power of attorney be cancelled and a receiver appointed.

Held, that the plaintiff is entitled to such relief as the facts proved upon the trial entitle him to. The judgment appealed from should be reversed and a new trial ordered with costs of the appellant to abide the event.

VAN BRUNT, P. J.—The complaint in this action was dismissed on the ground that it did not state facts sufficient to constitute a cause of action. The complaint alleges that the plaintiff and the defendant McFadden, for a long time prior to the 14th of January, were co-partners in business, and the defendant White for about six years previous had been in the employ of said firm as book-keeper and salesman; that the partnership by its own limitation expired on or about the about the above date, and the parties being unable by reason of past differences and disagreements between themselves to adjust the affairs of the firm, entered into an agreement of dissolution whereby, amongst other things, the defendant agreed to sell, assign, and set over to the plaintiff all his right, title and interest in and to the stock of the firm, except certain stock amounting, according to the inventory, to

about \$5,000, and also his right to the lease of the premises where the firm had lately transacted its business for the sum of \$13,417.30, and also all McFadden's interest in the European accounts for the sum of \$1,850.80. The articles of dissolution provided for the sale of the goods excepted and the division of its proceeds. They further provided that the outstanding accounts owing to the firm should be turned over to and collected by the defendant White, and the proceeds thereof deposited in the Pacific Bank in the city of New York, and that the same should be paid over in equal amounts to the said McFadden and the plaintiff after deducting the expenses of collection. The said parties also delivered a power of attorney to said White for the purpose of carrying out the provisions of said articles of dissolution.

The complaint then alleges that it was understood that the plaintiff was to continue the business at the firm's place of business, and that White was to continue in his employ, of all of which facts McFadden was well aware.

The complaint further alleges that there was a secret understanding between McFadden and White for the purpose of inducing the plaintiff to enter into the articles of dissolution and to execute said power of attorney, to lead the plaintiff to believe, and they did have him to believe, that White would remain with him, and that the outstanding debts due the firm would be collected from the firm's late place of business; that White remained with the plaintiff for a few days and then removed all the books and memoranda relating to the outstanding accounts from said premises, and went into business with McFadden; that White, although paid out of the assets of the firm the same salary he received as book-keeper and salesman, devotes by far the larger part of his his time to the business of the defendant McFadden; that he has exceeded his authority under said power of attorney, and has wholly refused to make weekly returns of money collected, as thereby required to be done, and that he has failed to deposit in said Pacific Bank moneys collected by him belonging to said firm to the amount of nearly \$2,000, and that he has either misapplied and converted the said moneys to his

own use, or in violation of his duty and the plaintiff's right, he has turned them over to said McFadden, instead of depositing them in said bank.

The plaintiff asks for the appointment of a receiver, that the power of attorney be cancelled and annulled, and that all the accounts and property of the firm be delivered to said receiver, who shall collect the same in order that it may be divided according to the terms of the articles of dissolution.

The learned counsel for the respondent claims that the allegations of the complaint charging the defendant with misconduct in his office as trustee, with waste and extravagance in the management of the estate committed to his hands, are not material and pertinent to the cause of action, which is an action for his removal and the cancellation of the power of attorney, on the ground that his selection and appointment were brought about by a fraudulent conspiracy. An examination of the complaint fails to show that such is necessarily the ground upon which that action is based. Upon the contrary, it would appear rather that the removal of White as trustee was sought because of the violation of his duties as such trustee, and that the allegations in regard to the fraud which was practiced upon the plaintiff inducing him to consent to the appointment of White are rather allegations giving a history of the proceedings to such appointment, and showing the fact that the defendant McFadden and White were linked together, and that, therefore, the plaintiff was excused from making the defendant McFadden a co-plaintiff with him against the defendant White.

But it is urged that if the action is considered as one to remove a trustee for misconduct in office the complaint does not contain allegations sufficient to maintain it. The failure of the defendant White to deposit the money collected by him in the Pacific Bank is distinctly alleged and admitted by the motion to dismiss the complaint. The requirements of the articles of dissolution in this regard are specific, and a deliberate violation of this provision is admitted.

It is difficult to see what further instance of violation of duty it would be necessary for the plaintiff to establish in

order to justify him in asking the Court for the removal of the trustee.

Nor is this all. The articles of dissolution and the power of attorney being executed at the same time, and for the purpose of obtaining the same object, must be read together. The power of attorney contained the provision that weekly accounts should be rendered of his proceedings by the trustee. The plaintiff alleges the refusal to furnish such weekly accounts, and this is also admitted upon the motion to dismiss the complaint, which would seem of itself to afford an additional reason for the removal of the trustee. A deliberate violation of the provisions of the trust by the trustee in material respects will always call upon the Court to take action against such trusts.

It may be true that in the prayer for relief the plaintiff has asked for relief which is inconsistent with the cause of action set out in his complaint. But that forms no ground of demurrer where the parties have appeared and answered. The plaintiff is entitled to such relief as the facts proved upon the trial entitle him to.

The claim that causes of action have been improperly joined which do not affect all the parties to the action cannot now be raised. Such an objection must be taken by the demurrer where it appears upon the face of the complaint as in the case at bar, if it appears at all, or it is waived.

The judgment appealed from should be reversed and a new trial ordered with costs of the appellant to abide the event.

I concur.

CHARLES DANIELS.

I concur.

J. R. B.

(Loftus D. Hatton, appellant, v. Harrison J. McFadden and another, respondents, Supreme Court, General Term.)

USURY.

Bonus Over and Above the Legal Interest Taken.—McGill, chancellor, delivered the following opinion :

This is a suit to foreclose a mortgage dated September 15, 1872, made by Marie Scholer and John Scholer, her husband, to Charles Pfenning, upon lands in Hudson County, to secure

the payment of \$1,650, in three years from its date, with interest at the rate of seven per cent per annum. Nothing has been paid upon the principal. The interest had been paid to September 15, 1883, at seven per cent per annum, to March 15, 1881, and after that date at six per cent per annum.

The defense is usury.

The defendant, Marie Scholer, about the time the loan was made to her, had commenced to build a dwelling upon the land in question, and finding that, because of the suspension of payment by a savings bank in which she had deposited her money, she must borrow funds to enable her to continue the building, applied to one Paul Hurbrandt, a real estate agent, to lend her \$1,500. After some negotiation Hurbrandt gave her \$1,473 of the money of Charles Pfenning, and took from her the mortgage in dispute. It satisfactorily appears that Hurbrandt retained \$27 for himself, for drawing the bond and mortgage, and procuring the searches necessary to the loan. The question disputed in the case is whether the complainant retained the additional \$150 kept from Mrs. Scholer, or knowingly allowed it to be retained by Hurbrandt. His position is that the money was kept by Hurbrandt as compensation for procuring the loan, and applied by him to his own use. He denies that he shared in the amount, but does not deny that he knew of the intention by Hurbrandt. The \$150 was far in excess of compensation for the services rendered by Hurbrandt in procuring the loan. If the complainant is believed, Hurbrandt had \$2,000 of his money for the purpose of investment upon bond and mortgage; and if Hurbrandt is believed, all that he did in procuring the loan was to send a messenger to the complainant to ascertain if the security would be satisfactory. The charge for services is manifestly an excuse to cover the taking of a usurious bonus; and it is immaterial whether the complainant shared in it or not if he knowingly allowed its payment to be a condition to the loan or assisted in its exaction at the time of the loan. (*Borcherling v. Trefz*, 1 New Jersey (L. ed.), 449; 4 Central Reporter, 337; 13 Stew. Eq., 502; *Demarest v. Van Denberg*, 1 New Jersey (L. ed.), 236; 3 Central Reporter, 90; 15 Stew. Eq., 63.)

The complainant caused Hurbrandt to be examined as a witness in his behalf in the city of Boston, and went himself to Lawrence, Mass., and brought the witness before the commissioner who took the testimony. Upon the examination Hurbrandt answered evasively that he "guessed" the complainant did not get any part of the \$150, and that he did not "recollect" that the complainant did share in it. Upon cross-examination he was confronted by an affidavit, made by him less than a year before, at the instance of his brother, in which he swore that the entire \$150 had been retained by the complainant.

Mrs. Scholer and her daughter, Mrs. Russell, testify positively to the fact that before the contract of loan was completed Mr. Pfenning was in the yard of the mortgaged premises, and told Mrs. Scholer that she must pay the ten per centum demanded or give up the loan. In corroboration of this testimony Henry Miller, a mason who was at work on the foundation of the house, says that he saw Pfenning in the yard. Charles F. Ruh, a real estate agent, testified that at about the time of the loan to Mrs. Scholer the complainant offered to transfer to him the investment of his moneys, upon condition that he, Ruh, would do as Hurbrandt had been doing—get for him a bonus of ten per centum upon all loans.

The evidence satisfies me that the \$150 was either directly retained by the complainant, or that he knew of, assented to, and assisted in, the taking of it by Hurbrandt. In either case the contract is tainted with usury, and the lender must be subjected to the penalty of the statute. (*Bennett v. Hadsell*, 8 C. E. Green, 174; *Meeker v. Disse*, 11 C. E. Green, 218; *Borcherling v. Trefz*, 1 New Jersey (L. ed.), 449; 4 Central Reporter, 337; 13 Stew. Eq., 502; *Demarest v. Van Denberg*, 1 New Jersey (L. ed.), 236; 3 Central Reporter, 90; 14 Stew. Eq., 63.)

The complainant is entitled to a decree for the \$1,500 actually loaned, less the interest which was paid to him in excess of lawful interest on that sum without interests or costs. (*Boyd v. Englebrecht*, 9 Stew. Eq., 612.) (*Pfenning v. Scholer*, decided October 18, 1887, 9 Central Reporter, 195, New Jersey statute law.)

Usury Cannot be Set up as a Defense in an Action Upon an Independent Obligation.—This was an action of debt by Benjamin T. Taylor against Jacob Breisch and others, trading as Jacob Breisch & Co. on two promissory notes, one for \$4,000, dated February 17, 1874, the other for \$1,832.77, dated January 21, 1874, given in renewal of notes for the same amounts, dated respectively November 22, 1871, and August 13, 1873, made by Jacob Breisch & Co., the former to the order of Adam Breisch, one of the partners, and indorsed first by him and then by all the other partners individually, the latter made by the same firm to the order of Henry Breisch, another partner, and indorsed first by him and then by all the other partners individually. At the trial before Bichtil, J., the following facts appeared:

The plaintiff was treasurer of the Pottsville Life Insurance and Trust Company, afterwards known as the Mechanics Safe Deposit Bank. Before the notes in suit were made the trust company or bank had been discounting the paper of Jacob Breisch and Jacob Breisch & Co. On June 17, 1870, Jacob Breisch assigned to the company certain securities as collateral for the payment of any paper which it then held or might thereafter hold, upon which he was either indorser or maker.

On November 22, 1871, Breisch indorsed on this assignment the further agreement that Taylor might hold the same securities as collateral or payment for any notes held by Taylor on which Breisch was liable. The original assignment of securities to the company was intended for and served as collateral for the payment of a note for \$3,500 made by Jacob Breisch & Co., and held by it November 22, 1871, and unpaid at the trial. On this note the company had received from Jacob Breisch & Co. usurious interest. The defendants claim to set off against the two notes in suit the collateral which would remain after deducting from the total collateral the amount necessary to pay the note for \$3,500, and for the purpose of establishing the amount necessary to pay that note introduced, under objection and exception by the plaintiff, the testimony necessary to prove the usurious interest and its amount (First Assignment of Error); and thus reduced the amount due upon the note for \$3,500 to such a point as

to show a balance sufficient to wipe out so much of the claim upon the notes in suit as was not disputed on other grounds. The defendants submitted, *inter alia*, the following point:

"1. That the \$3,500 note, first made June 18, 1870, is the only note held by the bank up to and before the 22d of November, 1871; that the proper way of getting at the amount due on that note is to deduct from the same all sums paid thereon in excess of the legal rate of interest at the several renewals of said note, and when the amount unpaid of said note is ascertained, the jury may set aside so much of the fund from the collateral securities as is necessary to satisfy the amount due on said note."

Ans. "To this we say, what notes the bank held on the 22d of November, 1871, or prior thereto, you must ascertain from all the evidence. With this explanation we affirm this point." (Second Assignment of Error.)

The Court charged the jury, *inter alia*, as follows:

"In ascertaining the amount due upon the papers the Trust Company held against Breisch, and for which it held the collaterals under the writing of June 14, 1870, you must deduct all payments which were made upon these securities, and this would include any illegal interest paid by Breisch to the Trust Company or to the bank. After doing this, whatever balance remains, being the balance arising from papers held by the bank, upon which Breisch was maker or indorser, such balance would carry legal interest to the time of the applying of the proceeds of the collateral." (Third Assignment of Error.)

Verdict and judgment for the defendants.

In Pennsylvania, under the existing interest law, it is not a crime for a creditor to demand and receive from a debtor interest at a usurious rate. The payment and receipt of usury is to-day just as legal as the payment and receipt of non-usurious interest. (*Miners Trust Company v. Roseberry*, 81 Pennsylvania, 313; *Appeal of Second National Bank*, 85 Pennsylvania, 528.)

The bank had a perfect right to receive the usury which it did from Breisch, and to keep it. It was not payment *pro tanto* when paid, and its payment can be taken advantage of only in action to recover it back or by a defense to an

action on the principal debt. No such advantage can be taken in any collateral proceeding.

If this suit were by the bank itself, the defendants would have no right to set up as defense herein the usury paid by them on the other series of notes held by the bank. (Maher's Appeal, 91 Pennsylvania, 516; Bright v. Mountain City Company, 3 Pennyp, 478.)

Much stronger is the case of an entire stranger, whose only connection with the claims of the bank upon the prior notes is that of the possession of a common security in which the bank has the priority.

A second mortgagee, in distribution of the proceeds of a mortgaged property, cannot set up the usury paid to the first mortgagee in payment of that mortgage, in whole or in part. Appeal of Second National Bank, 85 Pennsylvania, 528, practically overrules Greene v. Taylor, 39 Pennsylvania, 361—a case under the old interest law.

At that time the taking of more than six per cent interest was unlawful, and subjected the lender to a penalty. It is not so now. (Act of May 28, 1858, P. L., 622; Lennig's Appeal, 93 Pennsylvania, 301; Wheelock v. Wood, 93 Penn., 298.)

Mr. Justice Green delivered the opinion of the Court.

The assignments of error in this case raise but the one question—whether the direction to deduct the usury paid on the \$3,500 note was correct. It is not proposed by the defendants that the usury upon that note shall be deducted from the notes in suit; and therefore the question is not precisely the same as that presented in the cases cited in the argument.

But the \$3,500 note does not belong to the plaintiff; at least there is no legal identity of the plaintiff with the ostensible owners of that note. How then can the rights of such owners be determined in the present action to which they are not parties? How can we know that they may not have some reply to the defense of usury against their note?

They are not in court, they cannot be heard, and of course their rights cannot be determined. The defendants cannot be prejudiced, because their right to defend upon the ground of usury is always available to them whenever any action shall

be brought upon the \$3,500 note. But for the purposes of the present case we must be bound to regard that note as a distinct and independent transaction from the notes in suit, and therefore not open to a judicial determination of an allegation of usury against its owners on the trial of this action.

All our recent decisions are to the point that defense of usury against one obligation cannot be set up against an action upon an entirely distinct and independent obligation, even if it be between the same parties, much less can it be done where the parties are not the same. (*Bright v. Mountain City Company*, 3 Pennsylvania, 473; *Maher's Appeal*, 91 Pennsylvania, 516; *Appeal of Second National Bank*, 85 Pennsylvania, 538.) *Lennig's Appeal*, 93 Pennsylvania, 501.)

The assignments of error are sustained.

Judgment reversed and new venire awarded.

(*Taylor v. Breisch*, 9 Central Reporter, 605; decided October 3, 1887.)

VENDOR AND PURCHASER.

Effect of Trustee's Power to Sell Realty.—1. A purchaser upon a contract to receive a deed of land from executors empowered to sell under the will, may enforce by a suit in equity the executors to perform such contract. Also that he is entitled to have all incumbrances on the property removed. Where the widow of the testator has a dower right in the land to be conveyed by the executors, the purchaser may deduct the gross cash value of her dower right from the contract price. But where the widow is an executrix and joins in the contract to sell she waives her right, unless she reserves her right of dower, and must look to the purchase money for her equivalent, as she thereby consents to give a good title so far as her individual rights are concerned. She has the right to dispose of her dower right even before her right is fixed and determined.

2. Where a purchaser is ready, able and willing to perform his part of the contract to take real estate he is entitled to take the rents and profits from the agreed time to pass title, if the

delay or refusal to deliver the deed is made by the vendor. And where the vendor retains the possession of the premises contracted to be sold and transferred he is held liable to pay to the purchaser an amount equal to the value of the use and occupation of those premises, while the purchaser should be charged with interest on the moneys remaining unpaid in his hands, from the time agreed upon between them to transfer the property.

3. But where the purchase money has been appropriated and notice thereof is given to the vendor, and the purchaser has received no interest thereon, he is not liable to pay interest to the vendor, as in the case just above referred to. Thus, if the purchaser paid a portion of the consideration or purchase money at the time of making an agreement to buy real estate, and on the day appointed to pay the balance of the contract price and receive his deed, and it being refused by the vendor, the purchaser then deposited the money and gave notice to the vendor of that fact, and that the money was there subject to his order and his delivering the deed, then the purchaser, having completed his part of the contract, would not be liable to the vendor for the interest. (*Bostwick v. Beach*, 103 New York, 414.)

WARRANTY.

Effect of Deviation from.—Where, by the terms of a policy of life insurance, the assured warrants the truth of his answers to questions in his application, compliance with the warranty is a condition of the validity of the contract, and any substantial deviation from the truth in an answer, it is to be assumed, is material to the risk and forfeits the policy. (*Dwight v. Germania Life Insurance Company*, 103 New York, 341.)

Sale.—1. To constitute a warranty, neither the word “warranty” nor any equivalent word is indispensable. (*Walker v. Bowen*, (Minnesota), 17 North-Western Reporter, 943.)

2. It is sufficient if the language used by the vendor amounts to an undertaking that the goods are as represented. (*Patrick v. Leach*, (Nebraska), 1 North-Western

Reporter, 853; Neave v. Arutz, (Wisconsin), 14 North-Western Reporter, 41.)

3. A representation of the vendor, to become a warranty, must have been relied upon by the purchaser. (Halliday v. Briggs, (Nebraska), 18 North-Western Reporter, 55; Torkelson v. Jorgenson, (Minnesota), 10 North-Western Rep., 416.)

4. The statement must be such as to justify the vendee in relying upon it as a statement of fact, as distinguished from an opinion. (Manufacturing Company v. Thomas, (Iowa), 5 North-Western Reporter, 737; Worth v. McConnell, (Michigan), 4 North-Western Reporter, 198.)

5. A warranty of soundness of a horse, unless expressly restricted, extends to all manner of unsoundness, whether known to the vendor or not. (Van Hoeson v. Cameron, (Michigan), 20 North-Western Reporter, 609; Morse v. Pittman, (New Hampshire), 4 Atlantic Reporter, 880.)

6. Where a vendor warrants an article to be sound, he is liable, without reference to his intentions, in making such warranty, and it is unnecessary to aver, in an action by the vendee for breach of such warranty, that it was the intention of the vendor for the vendee to rely on such warranty.

7. A representation, pending the negotiation of the sale of certain mules, that the mules were "all right," is a warranty of the soundness of such mules. (McClintock v. Eurick, (Kentucky), 7 South-Western Reporter, 903.)

Caveat Emptor.—1. In sales of personal property in the absence of express warranty, where the buyer has an opportunity to inspect the commodity, and the seller is guilty of no fraud, and is neither the manufacturer nor the grower of the article he sells, the maxim of *caveat emptor* applies. (Kellogg Bridge Company v. Hamilton, 110 United States, 108; Dawson v. Chisholm, 1 New York, supplement, 171.)

2. If a buyer is satisfied without a warranty, and can inspect and declines to do it, he takes upon himself the risk that the article is merchantable. He cannot relieve himself and charge the seller, on the ground that the examination will occupy time, and is attended with labor and inconvenience. (Barnard v. Kellogg, 10 Wall., 383.)

3. If the manufacturer of an article sells it at a fair market price, knowing the purchaser designs to apply it to a particular purpose, he impliedly warrants it to be fit for that purpose; and if, owing to some defect in the article not visible to the purchaser, it is unfit for the purpose for which it is sold and bought, the seller is liable on his implied warranty. (Kellogg Bridge Company v. Hamilton, 110 United States, 108; Curtis & Co. Manufacturing Company v. Williams, (Arkansas), 3 South-Western Reporter, 517.)

4. In an action for the contract price of some bucks, defendant counter-claimed that plaintiff had warranted that the bucks were sound and were bred in Missouri, and would serve twenty-five ewes each, and alleged breaches; that at the time of the purchase they were diseased and unfit for service, and not bred in Missouri. Held, that an instruction that "if the disease and incapacity to serve ewes was acquired subsequently to the sale, the defense fails," is properly given. (Bothwell v. Farwell, (Iowa), 37 North-Western Rep. 392.)

5. Any affirmation at the time of a sale, as to the quality or condition of the thing sold, if intended as a warranty and relied on by the purchaser, is a warranty; and, there being evidence to show such facts, the question should be submitted to a jury for determination. (McLennan v. Ohmen, (California), 17 Pacific Reporter, 687.)

6. Where a purchaser, in making a written contract for the purchase of certain timber, acts on information derived from his own agents, and does not depend on representations made by the seller, and fails to secure an express warranty as to the amount of timber of the quality sold, no warranty will be implied, though, through unsoundness, the yield is far less than expected. (Nestor v. Michigan Land and Iron Company, (Michigan), 37 North-Western Reporter, 278.)

"To Give Satisfaction."—Where a machine is purchased with the special warranty that it will "do good work and give general satisfaction," the defendant in an action to recover the value thereof, is not entitled to an instruction that if it did not give satisfaction to him, they should find in his favor regardless of the fact as to whether or not the machine is

defective, or did or did not do good work. (May v. Hoover, (Indiana), 14 N. E. Reporter, 422.)

For further cases of warranty see Spalding v. Conant, (Massachusetts), 15 N. E. Reporter, 638; Englehard v. Clauson, (Ala.), 3 Southern Reporter, 680; Whitworth v. Thomas, (Ala.), 3 Southern Reporter, 781; Rerdue v. Hanwell, (Ga.), 4 South-Eastern Reporter, 877.)

WILLS.

"A will of fixed or immovable property is generally governed by the *lex loci rei sitæ*; and hence, the place where such a will happens to be made and the language in which it is written are wholly unimportant, as affecting both its construction and the ceremonial of its execution. The locality of the devised property is alone to be considered. * * * In regard to personal, or rather movable property, the *lex domicilii* prevails." (1 Jarman on Wills, pp. 1-3.)

Capacity to Make.—1. In deciding on the capacity of the testator to make his will, it is the soundness of the mind, and not the particular state of bodily health, that is to be attended to. He may be in a state of extreme imbecility, and yet possess sufficient understanding to direct how his property shall be disposed of; so old age, sickness, distress, and debility of body, will not incapacitate the testator, provided he has possession of his mental faculties, and understands the business in which he is engaged. (Chrisman v. Chrisman, (Oregon), 18 Pacific Reporter, 6.)

2. A testatrix bequeathed to her brother, who was her only relative in this country, five dollars in cash, assigning in her will, as a reason, that he had never visited her during her sickness. The balance of her estate, about \$5,000, she left to an acquaintance. When making her will she declared to her lawyer that her brother had never visited her. She was at that time very sick and weak in mind, and seemed to be forgetful. There was evidence that for several years she had acted as though demented. Her brother had visited her several times during her sickness. Held, that the decree admitting the will to probate should be reversed, and the

question whether she was laboring under a delusion or loss of memory so as to deprive her of testamentary capacity should be submitted to the jury. (*In re Weil*, 1 New York, Supplement National Reporter System, 91.)

3. On an issue as to testator's security, it being in evidence that the testator entertained great prejudice against the husband of his daughter, a plaintiff to whom he had given nothing by his will, an instruction that the husband was not a natural object of the testator's bounty, and that, while he might entertain such prejudice towards him as to be under an insane delusion as to him, yet, if such delusion did not prevent him from properly understanding and appreciating his relation towards those who had such natural claim on his bounty, said will would not thereby be invalidated, was held correct, especially where construed together with another to the effect that if testator was laboring under partial insanity at the time of making the will and entertained an insane delusion regarding said husband, which influenced him in the disposition of his property, so far as the daughter was concerned, then such insane delusion would invalidate the will. (*Grace v. Black* (Ill.), 17 N. E. Reporter, 66.)

On this point see further—*In re Brown* (Minnesota), 35 North-Western Reporter, 726; *Ray v. Ray* (North Carolina), 4 South-Eastern Reporter, 526; *McIntire v. Worthington* (Maryland), 12 Atlantic Reporter, 251; *McIntire v. Wilson* (Maryland), 12 Atlantic Reporter, 253; *Ayers v. Ayers* (New York), 12 Atlantic Reporter, 621; *Haddock v. Boston & Maine Railroad Company* (Massachusetts), 15 N. E. Reporter, 495.

4. Proof showing that testatrix was addicted to the use of morphine, and was at times odd in behavior, and apparently weak in mind, but that about the time of making the will, and at other times she was self-reliant and of good mind and understanding, is insufficient to show incapacity. (*Frost v. Wheeler* (New Jersey), 12 Atlantic Reporter, 612.)

Undue Influence.—1. The existence of undue influence at the time of execution of a will is a question of fact, and if the evidence is such that a rational mind might reasonably and

fairly draw the conclusion reached by the jury, the verdict will not be disturbed. (*Moore v. McDonald* (Maryland), 12 Atlantic Reporter, 117.)

2. The contestant pleaded incapacity and undue influence. The proponent introduced evidence to show the mental capacity of the testatrix; the contestant introduced evidence to show the testatrix was weak in body and mind, to show susceptibility to undue influence. The proponent called a witness in rebuttal as to the state of testatrix's health and activity during the last years of her life. Held, that such evidence was properly admitted as tending to rebut the contestant's evidence of undue influence. (*Dewey v. Pinney's Heirs* (Vermont), 12 Atlantic Reporter, 108.)

3. The fact that a deviser had declared that he did not care for his sisters, but wished to leave his property to those with whom he lived, and to whom he willed his property, had importuned him to a great extent to make his will, does not show such undue influence as would justify the setting aside the will. (*Trost v. Dingles* (Pennsylvania), 12 Atlantic Reporter, 296; *June v. Willis*, 30 Federal Reporter, 11; *King v. Cummings* (Vermont), 11 Atlantic Reporter, 727.)

4. Testator was a drunkard, who in 1882 inherited money, and a guardian was appointed for him. In November, 1884, he went to his brother's, who resisted the efforts of the guardian to take him away, and, being a saloon-keeper, furnished him with as much drink as he liked. On December 2, 1884, having been drinking slightly, he made a will, giving all his property to his brother, who promised him he might live with him as long as he liked. Held, a finding of undue influence in making the will is supported. (*Slinger v. Calverly* (Wisconsin), 37 North-Western Reporter, 236.)

5. A will will not be held to have been the product of undue influence, where a testatrix, suffering from extreme physical debility, held communications, upon the subject of making a will, with her sisters and husband, who were interested in influencing her testamentary disposition, but, at the same time, exhibited strength of mind in resisting the importunities and remonstrances of her husband in making a natural will,

and in intelligently and properly transacting other business. (Stankuburgh v. Hopkins (N. J.), 12 Atlantic Rep., 689.)

6. As to what is competent evidence of undue influence, and what amounts to undue influence, see Bledsoe v. Bledsoe (Kentucky), 1 South-Western Reporter, 10; Shelduecht v. Rompf's Executors (Kentucky), 4 South-Western Reporter, 235; McCullough v. Campbell (Arkansas), 5 South-Western Reporter, 590; Thompson v. Hawks, 14 Federal Reporter, 905; Saunders' Appeal (Connecticut), 6 Atlantic Reporter, 196; Rockwell's Appeal (Connecticut), 6 Atlantic Reporter, 190; Pemberton v. Pemberton (New Jersey), 7 Atlantic Reporter, 642; Blum v. Hartman (Pennsylvania), 12 Atlantic Reporter, 297.

Powers of Sale Under a Will.—Where a will directed that the testator's real estate should be sold after his youngest child arrived at age, "a majority of the heirs directing," and in such manner how such terms as the heirs might direct, and that the proceeds should be divided, and appointed executors, held, that by implication a power was conferred upon the executors to make such sale when a majority of the heirs should have exercised the discretion required of them by the will. (Decided May 16, 1888.)

Bill for construction of will.

The material portions of the will and the question presented are set forth in the opinion. McGill, chancellor, delivered the following opinion:

The bill is filed for the construction of the will of David M. Potter, deceased. The will was made on the 5th of December, 1872, and the testator died on the third day of February, 1879. The will directs that the testator's debt's and funeral expenses shall be paid, and then gives the entire personal estate to his wife, in her own right, and provides that no account shall be rendered therefor. It proceeds as follows:

Item.—I direct that all my real estate shall remain under the absolute control of my wife until my son, Stephen S. Potter, becomes of age; and I also direct that my wife shall have the use of the house and one-third of the proceeds of the farm until sold.

Item.—At any time after my son, Stephen S. Potter, attains the age of twenty-one years, and a majority of the heirs so directing, the real estate may be sold, either by public or private sale, as a whole or in lots, and upon such terms as a majority of the heirs shall have decided upon.

Item.—Whenever the real estate or any portion thereof is sold, I direct that one-third of the proceeds of such sale be given to my wife in her own right, and the residue and remainder thereof to be equally divided among my children, William S. Potter, Charles H. Potter, Sarah Kate, wife of Edgar Adriance, Anna E. Potter, David M. Potter, and Stephen S. Potter, share and share alike.

Lastly, I hereby appoint my beloved wife, Elizabeth Potter, and my son, William S. Potter, my executors of this my last will and testament.

The children mentioned in the will were all the children and heirs at law of the testator. In 1879 the youngest child, Stephen S. Potter, became of age, and in 1881 the son, Charles H. Potter, died, leaving a widow and two infant children, to whom, by his will, he devised and bequeathed all his estate, real and personal, in equal shares. The personal estate was sufficient to pay all the testator's debts. It is now desired that the farm shall be sold, and the executors seek instruction; (a) whether they have power to sell the farm when they shall be directed to do so by a majority of the heirs; (b) who are intended by the words the heirs, as these words are used in the will; (c) whether the heirs are to decide if the land shall be sold at public or private sale, and in whole or in part; (d) what the meaning of the word terms as used in the will is; and (e) whether they, in their capacities as executor and executrix, are charged with the duty of distributing the proceeds of the sale of the real estate.

The surviving children of the testator and the husband or wife of each of them, and the widow and children of the deceased son, Charles H. Potter, are the defendants in the suit. They have all failed to answer, and the bill has been taken as confessed against all of them but the infant defendants, and,

as well, its allegations have been established by proofs regularly taken. The primary and most important question in the inquiry is whether the contemplated sale of the farm is to be made by the executors. In discussing this question I must necessarily answer the other questions that the executors propound. As the executors are not expressly empowered to sell, authority must be found for them, if at all, by necessary implication from the language and scheme of the will.

In *Lippincott v. Lippincott*, 4 C. E. Green, 121, it is held, that the appointment of one as executor of a will that directs lands to be sold, does not of itself confer on him the power to sell; but if the executor is directed by the will, or bound by law to see to the application of the proceeds of sale, or if the proceeds, in the disposition of them, are mixed up and blended with the personalty, which it is the duty of the executor to dispose of and pay over, then a power of sale is conferred by implication. See also *Seeger v. Seeger*, 6 C. E. Green, 90; *Louderbough v. Weart*, 10 C. E. Green, 399; *Haggerty v. Lauterman*, 3 Stew. Eq., 37.

It was unquestionably the intention of the testator that his farm should be turned into money, and that that money should be divided between his widow and children in the proportions mentioned in the will. He provided for a postponement of the sale till his son, Stephen, should be twenty-one years old, and until a majority of his children should agree to it, and determine whether it should be by public auction or by private bargain, and whether the land should be sold in bulk or in parcels, and as to the terms of the sale, that is, the cash to be required at the time of the bargain, and at the time of conveyance, the limit of credit to be allowed, in money, time and security, the character of the vendees, the restriction of the uses to which the lands shall be put and the like—and until such majority should direct the sale. He contemplated that it would take place during the lives of his wife and children. He did not devise the land.

This is not the case of *Bentham v. Wiltshire*, 4 Madd., 44, because there the wife took an estate for life, in the land which was to be sold after her death, and at the same time was one

of the executors. That case turned upon the impossibility of holding that the testator could have intended that the wife should sell after her death.

Nor is it the case of *Geror v. Winter*, 1 Halst. Ch., 655, for there the land was expressly devised to three children, the majority of whom were to determine whether it should be divided among them or be sold, and there was no provision as to the disposition of the proceeds of the sale if the land should be sold.

In that case the Court held that the devisees must all join in the sale, and that the executors could not sell. The case in question is allied in principle to *Rankin v. Rankin*, 36 Illinois, 293, where the direction was that the testator's farm should be disposed of to the best advantage, either in bulk or in lots, and that the proceeds should be divided into four shares, which were to be distributed according to directions given in the will. There the Court held that the testator contemplated the bequest of a fund distributable by the executors, to be produced by the sale of his farm, and that the executors had power to sell the real estate.

In the case under consideration the farm is to be sold and the proceeds of sale are to be distributed, but the sale is not to take place till a majority of the testator's heirs, that is, his children, to whom the land would descend, shall determine upon its character and terms, and direct it. The executors are to perform the mere ministerial duties, that is, conduct the sale and distribute the proceeds, while the children, who are to have the beneficial interest (except the interest of the wife, who was given a place in the transaction as executrix), were to exercise the discretion and judgment which would be required.

By force of the word *directing*, which imports an order to another, this case is stronger, in favor of a power of sale in the executors, than *Rankin v. Rankin*.

I am of opinion that the executors will have the power to sell when a majority of the heirs, to whom the land has descended, shall exercise the discretion required of them by the will.

Testamentary Age (ALABAMA).—In Alabama it was enacted, in 1806, that an infant under the age of twenty-one years should have no power to devise real property, and this remains the law of Alabama, as it is that of most of the United States. The Code of 1852, § 1595; 1876 Code, § 2280, gave an infant of eighteen years power to bequeath personal property. Code 1876, § 2735, provision is made for relieving an infant of the disabilities of nonage by order of the Court on petition.

Sealing of Wills.—In Alabama sealing is expressly dispensed with.

Signature for Testator.—It is not necessary that each sheet of a will written on several sheets should be signed.

Testamentary Age (ARKANSAS).—In Arkansas the law is the same as Alabama except as to relief from disability. By the Revised Statutes, 1873, § 3034, it is provided that a female shall be of age for all purposes at eighteen.

Signature.—The statute requires the person signing by testator's direction for him to sign the will himself, as a witness also, and state that he signed at the testator's request for him.

Acknowledgment.—Whatever may have been the original will as to acknowledgment by the testator of his signature, such acknowledgment in the witnesses's presence is now held to be a sufficient substitute for signing in their presence in England and in most of the United States.

Testamentary Age (CALIFORNIA).—Every person of the age of eighteen years can make a will, if of sound mind.

Signature for Testator.—Wills must be signed by the testator, or by some other person subscribing his name for him in his presence, and by his direction.

Acknowledgment.—Same as Arkansas.

Testamentary Age (COLORADO).—Males of the age of twenty-one years, and unmarried females of the age of eighteen may devise real property, and all persons of the age of seventeen years may bequeath personal property.

Signature for Witness.—Wills must be signed by the testa-

tor, or by some other person for him in his presence and by his direction.

Acknowledgment.—Same as Arkansas.

Testamentary Age (CONNECTICUT).—Eighteen years for all kinds of property.

Signature of Testator.—A will must be subscribed by the testator.

Attestation.—Three witnesses are required, all of them subscribing in testator's presence and in the presence of each other.

Testamentary Age (DELAWARE).—Twenty-one years without distinction between real and personal property.

Signature.—It is not necessary that each sheet of a will written on several sheets should be signed, and such signature may be on a paper or parchment pasted or annexed in some other manner to the will.

Attestation.—Wills must be "attested and subscribed" by two or more credible witnesses.

Testamentary Age (DISTRICT OF COLUMBIA).—No will of real estate could be made by an infant under the age of twenty-one years—twenty-one for males and eighteen for females.

Acknowledgment.—Same as Arkansas.

Attestation.—The witness is required to sign his name. A signature of the witness by initials has been held sufficient. Guiding the hand of the witness makes a good signature, if he is unable to write, but not otherwise. Another may sign for a witness unable to write.

Testamentary Age (FLORIDA).—Twenty-one years without distinction between real and personal property.

Signature for Testator.—Wills which are not holograph or nuncupative must be signed as in Delaware.

Attestation.—Wills must be attested by three witnesses and they need not be credible.

Testamentary Age (GEORGIA).—In Georgia the common law remains unchanged, except that no infant under fourteen years can make a valid will.

Signature for Testator.—Same as Alabama.

Attestation.—Wills must be “attested and subscribed” in testator’s presence by three competent witnesses. “A witness may attest by his mark, provided he can swear to the same, but one witness cannot subscribe the name of another, even in his presence, and by his direction. Testator’s acknowledgment of his signature is sufficient.

Testamentary Age (ILLINOIS).—The age is fixed as to real property, at twenty-one years for males and eighteen years for females, and as to personal property at seventeen for both males and females, until 1872, when the provision was omitted in the revision.

Signature for Witnesses.—All written wills should be signed by the testator. In 1829 the Revised Code added to this a provision for signing by some other person for the testator, in his presence and by his direction.

Attestation.—Wills must be attested in the presence of the testator by two or more credible witnesses, of whom two must make oath that they were present and saw testator sign, and believed him to be of sound mind, memory and judgment, and since 1829 it is provided that an acknowledgment of his signature by the testator shall be equivalent to his signing in the witnesses’ presence.

Testamentary Age (INDIANA).—Infants are excepted from the authority to make wills conferred by the statute of wills. Minority, however, ends with females at the age of eighteen, and with all persons on their marriage.

Signature for Testator.—Wills must be signed by the testator (Revised Statutes, 1852, p. 313, § 18). This last statute also provided for the signature by another for the testator in his presence and by his direction.

Attestation.—Wills must be “attested and subscribed” by two or more competent witnesses in testator’s presence.

Testamentary Age (IOWA).—Same as Indiana.

Signature for Testator.—All wills must be signed by the testator or by another for him in his presence and by his direction.

Testamentary Age (KANSAS).—The age is fixed at twenty-one years for real property, and eighteen years for personal property, but no will, except in execution of a power or for appointment of testamentary guardian, can be made under the age of twenty-one years.

Signature for Testator.—Every will must be signed, since 1865, at the end thereof by the testator, or by another person for him in his presence and by his direction.

Attestation.—Every will must be attested by two competent witnesses in testator's presence, who before the Act of 1859 were required to "subscribe their names," and who by the Act of 1865 are required to "subscribe," and must prove that they saw testator sign, or heard him acknowledge his signature to the will.

Testamentary Age (KENTUCKY).—Same as Kansas.

Signature for Testator.—The will must be signed by the testator or by some other person for him in his presence and by his direction, "with the name of the testator subscribed." This is copied from the Act of 1797 (1 Litt, 611, § 1), except the words quoted above.

Acknowledgment.—Same as Arkansas.

Testamentary Age (LOUISIANA).—

Sealing of Wills.—It is necessary in case of "mystic" wills. Of the seven seals affixed by the witnesses on the outside of the will made under Roman law Sir H. Maine says: "This is the first appearance of sealing in the history of jurisprudence considered as a mode of authentication. It is to be observed that the seals of Roman wills and other documents of importance did not simply serve as the index of the presence or assent of the signatory, but were literally fastenings, which had to be broken before the writing could be inspected."

Signature for Testator.—Nuncupative wills, by public act before a notary, must be signed by the testator, or his excuse for not doing so stated in the will. Mystic or sealed wills must be signed by the testator.

Attestation by Mark.—Another may sign for a witness unable to write; the witness making his mark and the other

person writing the witness' name, but not in such case unless he makes his mark.

Testamentary Age (MAINE).—Twenty-one for real property.

Signature for Testator.—Wills must be signed by the testator or by another person for him in his presence and by his direction.

Nuncupative Wills.—All wills must be written except nuncupative wills.

Testamentary Age (MARYLAND).—For real property, at twenty-one for males, and at eighteen for females.

Signature for Testator.—Wills must be signed by the testator, or by another person for him in his presence and by his direction.

Testamentary Age (MASSACHUSETTS).—The right to dispose of either real or personal property by will is now given by statute only to persons of full age.

Signature for Testator.—Wills must be signed by the testator or by another for him in his presence and by his direction, the requirement of a seal being omitted.

Attestation.—Wills must be "attested and subscribed" in testator's presence by three witnesses, but only one witness is required to prove the will.

Testamentary Age (MICHIGAN).—The right to dispose of either real or personal property by will is now given by statute only to persons of full age.

Signature for Testator.—The present law requires only that the will be signed by the testator or by another for him in his presence and by his direction.

Attestation.—Wills must be attested and subscribed in the presence of the testator by "two competent witnesses," holograph wills being no longer provided for.

Testamentary Age (MINNESOTA).—The law is the same as in Michigan.

Signature for Testator.—The law is the same as in Michigan.

Attestation.—Wills must be "attested and subscribed" in testator's presence by two competent witnesses.

Testamentary Age (MISSISSIPPI).—Although formerly married, females of eighteen might make a will.

Signature for Testator.—Same as in Michigan.

Attestation.—Holograph wills are excepted. Other wills must be “attested” in testator’s presence by three credible witnesses for real property and one or more for personalty. And an endorsement upon the same paper has been held to be a sufficient signing.

Testamentary Age (MISSOURI).—The power is given generally to all persons of twenty-one years to devise real property, and all persons of eighteen years to bequeath personalty.

Signature for Testator.—Same as in Michigan.

Attestation.—Holograph wills were excepted until 1835. Other wills must be attested by two competent witnesses, subscribing their names in testator’s presence.

Testamentary Age (NEBRASKA).—The power is given generally to every person of full age.

Signature for Testator.—The requirement was, as in Michigan at first. This was changed to a requirement that it be subscribed at the end, which is, however, omitted in subsequent statutes.

Attestation.—Wills need only be signed by the testator, and “attested and subscribed” in the presence of the testator by two or more competent witnesses.

Testamentary Age (NEVADA).—Every person of the age of eighteen may make a will of both personal and real estate.

Signature for Testator.—Wills must be signed and sealed by the testator, or by another for him, in his presence, and by his direction.

Attestation.—Wills must be attested by two competent witnesses subscribing their names in testator’s presence.

Testamentary Age (NEW HAMPSHIRE).—Every person of the age of twenty-one might dispose by will of his or her real estate, and may now dispose of real and personal property. Married women may so dispose.

Signature for Testator.—The requirements of signing and sealing are the same as in Nevada.

Attestation.—Wills must be “attested and subscribed” in testator’s presence by three or more credible witnesses.

Testamentary Age (NEW JERSEY).—No person under the age of twenty-one can make a will of either real or personal property.

Signature of Testator.—Wills must be signed by the testator, “which signature shall be made by the testator.”

Attestation.—Wills must be signed or acknowledged by the testator in the presence of two witnesses, and the witnesses must be present at the same time and subscribe their names in the presence of the testator.

Testamentary Age (NEW YORK).—By Act of 1789 infants were declared incapable of devising real property, but the Revised Statutes of 1829–30 (2 R. S., 46, § 21,) gave the power of disposing of personalty by will to males at eighteen and unmarried females at sixteen. The distinction between married and unmarried females is now removed.

Signature for Testator.—Since the revision of 1829 wills must be signed by the testator at the end of the will. Before this Act wills were required to be signed only by the testator, or by some other person in his presence, and by his express direction. It was held in 1869 that a signature at the end of the attestation clause with the witness is sufficient.

Testamentary Age (NORTH CAROLINA).—The present law allows no will to be made under the age of twenty-one.

Signature for Testator.—By the Act of 1784 wills must be signed by the testator, or by another for him, in his presence and by his direction, extending the Act of 1784 to wills of personal property.

Attestation.—Provision was made in 1784 for holograph wills found among testator’s valuable papers, or lodged by him with some person for safe keeping, with the testator’s name “subscribed thereto or inserted in some part of such will,” on proof of his handwriting by three witnesses. Other wills must be signed in the presence of at least two disinterested witnesses, and subscribed by them in testator’s presence in North Carolina.

Testamentary Age (OHIO).—Only persons of full age can make a will.

Sealing.—A “seal either of wax, wafer or ink” must be affixed to every will. It is not enough for the testator to sign without the witnesses, and the witnesses to sign a superadded clause without the testator.

Attestation.—Wills must be attested by two or more “competent” witnesses, who must subscribe their names in testator’s presence, and must have seen him subscribe his name or heard him acknowledge his signature.

Testamentary Age (OREGON).—The testamentary age is retained at twenty-one for wills of real property, and at eighteen for wills of personalty.

Signature for Testator.—Wills must be signed by the testator, or for him by another, in his presence and by his direction, and such person signing for the testator must sign as an attesting witness, and state that he subscribed the will for the testator.

Attestation.—Wills must be “attested” by two competent witnesses subscribing their names in testator’s presence.

Testamentary Age (PENNSYLVANIA).—The testamentary age is fixed at twenty-one for all wills.

Signature for Testator.—A will must be signed by the testator at the end, unless prevented by extremity of last sickness, and in such case, by another at his request and in his presence, a mark is sufficient signature. A clause stating reasons for the will added after testator’s signature invalidates the whole.

Attestation.—Wills must be proved by the oath or affirmations of two or more competent witnesses (1833 P. L., 249, § 6; 1872, Purd. Dig., 1474, § 6). Under this act it has been held that a will need not be subscribed by witnesses not proved by subscribing witnesses.

Testamentary Age (RHODE ISLAND).—The age is fixed at twenty-one years for real property and eighteen years for personalty.

Signature for Testator.—A will must be signed by the

testator, or by another for him, in his presence and at his request.

Attestation.—Devises of land must be “attested and subscribed” by two witnesses in the devisor’s presence.

Testamentary Age (SOUTH CAROLINA).—Infants under the age of twenty-one have been and continue to be excepted from the wills act.

Signature for Testator.—Same as in the State of Rhode Island.

Testamentary Age (TENNESSEE).—The statute of North Carolina prohibiting wills of personalty by an infant under eighteen years is in force, so far changing the common law.

Signature for Testator.—Same as Rhode Island.

Attestation.—The law as to holograph wills and as to attestation is the same as in North Carolina.

Testamentary Age (TEXAS).—Only persons of the age of twenty-one could make a will (1840 P. L., 167, § 1,) until this was extended to all persons “who may be or may have been lawfully married.”

Signature for Testator.—Same as Rhode Island.

Attestation.—Holograph wills need not be attested. Other wills must be “attested” by two or more credible witnesses, above the age of fourteen years, subscribing their names in testator’s presence.

Testamentary Age (VERMONT).—The Act of 1821 made infants incapable of making a will of real property. This was changed in 1851 to eighteen for females, and by the same statutes every one might dispose of personal property by will. These Acts seem to restore the common law rule as to personalty.

Signature for Testator.—Same as Rhode Island. Sealing was originally required by the Act of 1797. But a holograph will, with testator’s name in the body but not subscribed, was held to be well executed.

Attestation.—Three witnesses are required by whom the will must be “attested and subscribed” in the presence of the testator and of each other.

Testamentary Age (VIRGINIA).—Since 1785 the age has been twenty-one years for real property and eighteen for personalty.

Signature for Testator.—Same as Vermont, and has not been changed. And a holograph will with name in body of will but no subscription has been held sufficient; but not where an attestation clause showed the will to be incomplete.

Attestation.—Wills other than holograph must be signed or acknowledged in the presence of two or more competent witnesses, and by them subscribed in testator's presence, they being present at the same time, extending to wills of personalty what before only applied to devises of land; but no form of attestation is necessary.

Testamentary Age (WEST VIRGINIA).—Same as in the State of Virginia.

Signature for Testator.—A will must be signed by the testator, or by another for him, in his presence and by his direction, "in such manner as to make it manifest that the name is intended as his signature."

Attestation.—Wills other than holograph must be signed or acknowledged by testator in the presence of two competent witnesses "present at the same time," and subscribing in testator's presence.

Testamentary Age (WISCONSIN).—Same as Virginia since 1878, although formerly only persons of full age could make a will there. A married woman may, however, dispose of her separate property at the age of eighteen years. In the year 1660 an exception to infants' testamentary disability was made in favor of the appointment of testamentary guardians by fathers themselves still under age, for their infant children.

Signature for Testator.—Every will must be signed by the testator, or by some other person for him in his presence and by his direction.

Attestation.—Wills must be "attested and subscribed" in testator's presence by two "competent" witnesses, requiring three witnesses and applying only to devises.

ADDENDUM.

Under this head will be found treated a variety of subjects, to which it has been impossible to give more than a small fragment of space.

Abusive Postal Card.—Writer not Indictable.—Smith sent a postal card denouncing his correspondent as “a d—n scoundrel and rascal,” and declining any further business relations with him. He was proceeded against by information, in the United States District Court for the Southern District of Kentucky, for violating Section 3893 United States Revised Statutes, against mailing obscene or indecent publications. The Court quashed the information, saying—“The connection in which the word ‘indecent’ is used, taken in connection with the history of the legislation upon the subject, leads me to the conclusion that it means immodest, impure; and that language which is coarse and unbecoming, or even profane, is not within the inhibition of this act.” (United States v. Smith, March, 1882.)

Offer of Reward Binding when Condition is Performed.—Notice of Acceptance not Necessary.—A house being on fire and P.’s wife within, he made the offer, “I will give \$5,000 to any person who will bring the body of my wife from that building, dead or alive.” R., a paid fireman, at the imminent risk of his life, sprang into the burning house, and brought out the woman’s body. P. then refused to pay the offered reward, but the Wisconsin Supreme Court held him bound to do so, saying that B.’s duties as a paid fireman did not oblige him to effect the rescue gratuitously, and that the general rule requiring notice of acceptance of an offer, did not apply in a case of this kind. The Court further said—“The offer of a reward by the defendant for rescuing the body of his wife, and the rescue of her remains by the plaintiff, with knowledge of such offer, and with a view to obtaining the reward offered, constituted a contract between the parties, which was fully and completely executed by the plaintiff.” (Reif v. Page, 13 North-Western Reporter, 473.)

Custom and Usage.—Conditions Necessary to Establish a Valid Custom.—A large wharf-boat which was lying at Evansville, Ind., was swept away by a sheet of floating ice in the Ohio River, wrecked and burned. In an action against the marine insurance company whose policy covered the boat, the principal defense was that the owners were negligent in not removing the boat to a place of safety, according to an alleged custom. To prove the custom a witness was introduced who offered to testify that Green River, about eight miles above Evansville, was a perfect place of safety, and that it was at the time of the accident and had been from time immemorial, the well understood, universal and perfectly well known custom among all river men, owners and masters of wharf-boats, etc., to take all such boats and wharf-boats to the mouth of the Green River upon the approach of danger from floating ice in the Ohio River; that such custom was well known in Evansville; that the boat could have been readily towed to that place of safety; that the witness had been engaged in the river business for the previous ten years, etc. The Supreme Court excluded the testimony, upon the following considerations: "The facts above stated and offered to be proved lack some of the essential requisites necessary to the validity of a particular custom at common law; as that it was continued without interruption, was peaceable, and acquiesced in, and was compulsory and binding upon all, and lack an important requisite to make it binding in this State, namely, that it was co-extensive with the State. Perhaps it is not within the constitutional power of the legislature in this State to make such a particular and local custom binding, even by express statute; much less, then, could it be applied by the common law." (Franklin Insurance Company v. Humphreys, Indiana Supreme Court, May 28, 1879.)

Claim of Coal Company to Acquire Land by Condemnation. Not a Public Use.—The German Coal Company, an Illinois corporation, organized under the general state law for the purpose of "mining and selling coal," filed a petition under the Eminent Domain Act, in the County Court of Peoria

County, for the purpose of acquiring by condemnation the right of way over a narrow strip of land lying between the company's coal works and the Peoria & Pekin Union Railroad. The piece of land was wanted for an extension of a tramway belonging to the company, so as to connect it with the railway. The Illinois Supreme Court, in denying the right of the company to take the land, said:

"The parties in this case are agreed that if the use for which the property is sought to be taken is a private one, there is no power or authority under the Constitution to take it.

* * * * It is clear the use for which the land is proposed to be taken is not a public one. The coal, the coal works, and the present tramway are in the strictest sense private property, and the public generally have no more interest in them or in the operation of the works, including the tramway, than they have in any other strictly private business. The same would be equally true after the proposed extension of the tramway. * *

Without the consent of the owners of it, there is not a person in the State, outside of themselves, who would have the right to ride upon it on any terms that might be proposed, or to have carried upon it a single pound of freight. * *

It is manifest that the company now has, and after such extension of its track would still have, the right to use it for its private business exclusively. It could run it or cease to use it altogether, without violating any right in the public, or any duty which it owes to the people. Clearly this could not be so if the use were public in the sense of the Constitution." (Sholl v. German Coal Company, 8 Western Reporter, 94.)

Business Signs.—Use of the Words "Late With" another Person or Firm.—An Injunction Obtainable.—H., a former employee of J. P. V. W., set up business for himself, and in his advertisements and on his signs used the words, "late with James P. Van Wyck." The latter brought suit to restrain H. from making this use of his name, and in the Supreme Court, Special Term, Judge Westbrook made the order asked for, with a statement of his reasons, among which we find the following:

“That which belongs to a person is his own, and nothing is more completely the property of a man than his name. No person can use it without its owner’s consent, and the use of that of the plaintiff to make conspicuous the rival business and name of the defendant is as clear a violation of the property rights of the plaintiff as it would be for the defendant to take some article of personal property belonging to the plaintiff—a tall pole, for example, which will illustrate the act of the defendant, who uses the plaintiff’s name to elevate and call attention to his own—and display upon it the name and business of the defendant.” (Van Wyck v. Horowitz, 28 New York, Daily Register, 305.)

Lost Note and Mortgage.—Nature of Search to Find them.—Substituted Evidence of the Contract.—One Jernigan gave his note to Daniel Nix, secured by mortgage upon a lot of oats, and was afterwards indicted for selling or carrying away some forty bundles of the oats without first obtaining the consent of Nix. The note and mortgage having been lost, secondary evidence was admitted to prove the contents of those papers. The sufficiency of the search to show their actual loss was considered by the Alabama Supreme Court on appeal, and the following hints to guide persons under similar circumstances were given in the opinion:

“In accounting for the absence of a writing, material testimony in the cause, so as to let in secondary evidence of its contents, no universal rule can be declared which will be applicable to every case. * * * A material inquiry in such cases is whether or not there was a probable motive for withholding this highest and best evidence. Whenever the Court is able to answer this inquiry in the negative, less evidence will satisfy its conscience than if suspicious circumstances attended the transaction. As a rule there must be careful search at the place at which it was last known to be, if its place of custody can be traced or remembered. If not, then such search must be made at any and every place where it would be likely to be found. It is not denied that in this case diligent search was made for the missing papers at the place at which the testimony tends to show they were last

seen. The search was made by three, acting together, and on two separate occasions. The papers were not found. The objection to the preliminary proof of loss is that only one of the three who made the search is produced as a witness. The other two are shown to have been in the state, but in counties distant from the scene of the trial. The search appears to have been carefully made, and there is an absence of proof of fact or circumstance tending to show a motive for withholding the papers. We think the proof of loss was sufficient to let in the secondary evidence." (Jernigan v. State, 1 Southern Reporter, 73, 1887.)

Payment Under Urgent Need, not Amounting to Necessity, or Duress.—No Recovery Back.—One Emery and another applied to the mayor and aldermen of Lowell, Mass., for a liquor license, which it was voted to grant. Before it was given, however, the license fee was raised from \$200 to \$1,000. The sum of \$200 was tendered and refused; thereupon the \$1,000 required was paid under protest, the license obtained, and suit then brought to recover back \$800 of the amount, as having been paid under compulsion. The suit was unsuccessful, the Supreme Court holding the view that "the plaintiffs had not acquired a right, as against the defendant, to a license for a fee of \$200, before the vote was passed fixing the fee at \$1,000. Even if this were not so, the payment was a voluntary one. We do not regard it as changing the character of a payment from voluntary to involuntary or compulsory, that it is important to the party paying to get what he gets by the payment; in other words, that there should be an urgent need on his part. It is ordinarily and almost necessarily true that one pays what he regards as extravagant, only for what seems to him an important result, and submits to the demand for what he regards as an exorbitant or illegal fee only because there is an urgent need for what the payment will produce. * * * The plaintiffs wished a license. They were at liberty to take it or not, as they saw fit. * * They must be held to have paid voluntarily, and not under coercion." (Emery v. City of Lowell, 126 Massachusetts.)

Quarantine Regulations.—State Law Valid Until Congress acts.—Charges must not be Measured by Vessel Tonnage Capacity.—Vessels engaged in foreign or interstate commerce are instruments of such commerce, and consequently are within the clause of the Constitution which vests the power to regulate commerce in Congress alone. A Louisiana State law requiring all vessels arriving at New Orleans to undergo inspection and obtain a certificate, paying fees and charges therefor, was accordingly resisted by Morgan's Steamship Company, on the ground that it was in violation of this constitutional provision, and also of that which declares that "no state shall, without the consent of Congress, lay any duty on tonnage." "The services for which these fees are to be collected," said Justice Miller in the United States Supreme Court, "are parts of a system of quarantine provided by the laws of Louisiana, for the protection of the State, and especially of New Orleans, an important commercial city, from infectious and contagious diseases which might be brought there by vessels coming through the Gulf of Mexico from all parts of the world, and up the Mississippi River to New Orleans. This system of quarantine differs in no essential respect from similar systems in operation in all important sea-ports all over the world, where commerce and civilization prevail. * * * Nor is it denied that the enactment of quarantine laws is within the province of the states of this Union. Of all the elements of this quarantine system of the State of Louisiana, the only feature which is assailed as unconstitutional is that which requires that the vessels which are examined at the quarantine station, with respect to their sanitary condition and that of their passengers, shall pay the compensation which the law fixes for this service. This compensation is called a tonnage tax, forbidden by the Constitution of the United States; a regulation of commerce exclusively within the power of Congress; and also a regulation which gives a preference to the port of New Orleans over ports of other states."

The fees payable under the law were "for every ship \$30; for every bark \$20," etc. In a previous case (*Peete v. Mor-*

gan, 19 Wall., 581,) the tax was imposed on every vessel arriving at a quarantine station, whether any service was rendered or not, \$5 for the first hundred tons of her capacity, and one and a half cents for every additional ton, and this mode of measuring the tax was held to make it a tonnage tax. The same fact was presented in *Cannon v. New Orleans*, 20 Wall., 577, though in the latter case it was called a wharfage tax. The Court, however, held it to be a tax for the privilege of landing in the port, whether the vessel used the wharf or not, and for this reason, and because the amount of it was measured by the vessel's tonnage, it was held void. Several other cases were ruled by the same principle, the tonnage capacity of the vessel being taken as a measure of the charge. In the absence of such a feature, the Court held that the fees imposed in the present instance did not constitute a tonnage tax.

It was admitted by the Court that the system was "in some sense a regulation of commerce." Also that "it may be conceded that whenever Congress shall undertake to provide for the commercial cities of the United States a general system of quarantine, or shall confide the execution of the details of such a system to a National Board of Health, or to local boards, as may be found expedient, all state laws on the subject will be abrogated, at least so far as the two are inconsistent. But until this is done, the laws of the State on the subject are valid." (*Morgan v. Louisiana*, 118 United States, 455.)

Residence and Domicile.—How New Residence is Acquired.—Intention, and Sending Family to New Residence not Sufficient.—Personal Presence Necessary.—In a case where the right of action depended on the question whether the plaintiff had gained a residence in the State of New York, his right being otherwise barred by the statute of limitations, or in popular language "outlawed," the facts, as stated in the opinion of the United States Circuit Court, E. D. New York, by Judge Benedict, were as follows:

"Prior to August, 1883, the plaintiff resided in St. Louis. In August, 1883, he formed the intention to take up his resi-

dence in Brooklyn, N. Y. In pursuance of that intention, in August, 1883, he sent his wife and children to Brooklyn, and upon arriving there his wife hired a house in which she and her children thereafter lived. The plaintiff himself, however, did not come to Brooklyn till January of the next year."

"Upon this proof," continued the Court, "the question arises whether the fact that the plaintiff prior to November 30, formed the intention to change his residence to New York, and the further fact that he had gone so far in carrying that intention into effect as to send his wife and children to New York to live, coupled with the fact that he himself did not come to New York until January, 1884, was sufficient to give him a residence in New York prior to November 30, 1883. Upon this question I am of opinion that mere intention to change his residence does not effect that change, but that, coupled with such an intention, there must be acts done, and that one act must be that of living for some period of time in the place of intended residence. Residence involves personal presence. The fact that the plaintiff's family lived in New York prior to November, 1883, did not make him a resident of New York. A man may have his home or domicile in this State, and be at the same time a resident of another. 'Change of mind may lead to a change of residence, but cannot, with any propriety, be deemed such of itself.' (Frost v. Brisbin, 19 Wend., 14.) To the intention to take up the new residence must, in my opinion, be added the fact of living in the new place for some period of time—I do not say how long. Here the plaintiff did not follow his wife to New York till January, 1884. Up to that time, although he sent his wife to New York in August, 1883, it was optional to him to abandon his intention without affecting his residence. If instead of coming to New York in January, 1884, he had, under a change of intention, recalled his wife to St. Louis, it would scarcely be argued, I should suppose, that he had lost his residence in St. Louis, by reason of what his wife and children had done in New York. Under such a state of facts it would doubtless be held that the fact that he himself continued to live in St. Louis was sufficient to prevent a loss of residence there. If so, the fact that he did not come to New York until Janu-

ary, 1884, compels the decision that he had not acquired a residence in New York on November 30, 1883." (Penfield v. Chesapeake, O. & S. W. R. R. Co., 29 Federal Reporter, 494.)

Agency.—1. It was held that a salesman representing to a purchaser that he would sell to no other dealer in the same city succeeded in selling goods, which promise was broken in so far as the salesman sold the same kind of goods in the same city, that the principal was bound by the statement of the salesman, as he was apparently clothed with the authority to make the same, and therefore the purchaser's defense was valid. (23 Reporter, 391.)

2. An agent who makes a contract outside of his employment as such agent, and who turns over to his principals the result of a transaction, who receive the same but without the knowledge that a contract had been made from which the money flowed; the mere fact of receiving the money would not in itself bind the principal to such contract unknown to them because they had retained the money. (36 Kan., 284.)

3. A husband is liable in an action brought by a broker to recover his commissions in the sale of property, although the title be in the wife, so long as the husband made himself personally liable, and irrespective of the fact of the agency of the husband being made known to the broker or not. (7 Central Reporter, 675.)

LEGAL FORMS.

GLOSSARY.

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LEGAL FORMS.

ACKNOWLEDGMENT.

State of } s. s.
 County of }
 On this day of A. D. , before me personally came A. B., to me known to be the individual described in, and who executed the within instrument, and acknowledged that he executed the same for the purposes therein mentioned.
[Signature and title of officer.]

ARBITRATION—SUBMISSION AGREEMENT.

[With provision for an Umpire, etc.]

Know all men by these presents: That controversies exist and have for a long time existed between A. B., of , and C. D., of .

That said A. B. and C. D., do hereby mutually agree to and with each other to submit all and all manner of actions, cause and causes of action, suits, controversies, claims and demands whatsoever, now pending, existing, or held by and between them to as arbitrators, who shall arbitrate, award, determine, judge, and order of and concerning the same.

That said arbitrators shall have power to award payment of the costs and expenses incurred in said arbitration.

That said award shall be made in writing, under the hands of said arbitrators, ready to be delivered to us, or either of us, on or before the day of .

That in case said arbitrators do not make their award on or before said day, then the matters and things above submitted shall be, and are by these presents submitted to the decision of such third person as shall be then, or shall theretofore have been appointed (in writing and indorsed thereon) by said arbitrators to act and arbitrate of and concerning said premises, and make his award and umpirage in writing on or before the day of .

That said parties do mutually covenant to and with each other that the award (and umpirage) made as aforesaid shall by each of them and their legal representatives be well and faithfully kept, observed and performed.

Witness our hands and seals, this day of 18 .
[Signature of Witness.] *[Signature.]*

ARBITRATION—AWARD.

Know all men by these presents: That by agreement bearing date the day of , the matters in difference, etc., between A. B. and C. D. were by them submitted to the consideration of the undersigned arbitrator, to hear, determine, and award concerning the same.

That by virtue of said agreement, and after hearing the allegations and proofs of said parties, and examining the subjects in controversy between them, I do award, determine and order as follows:

That etc. (Set out the award clearly.)
 Witness my hand and seal, this day of 18 .
[Signature of Witness.] *[Signature.]*

ASSIGNMENT—WITH CONDITIONS—WITH POWER OF ATTORNEY.

Know all men by these presents: That I, , for value received, do hereby grant, assign, transfer, and convey unto E. F. (*here describe the property*). To have and to hold the same forever, hereby appointing and constituting said E. F. my true and lawful attorney in my name, place, and stead, for the purpose aforesaid, to ask, demand, sue for, attach, levy, recover, and receive all such sum and sums of money, which are now or may hereafter become due and payable for or on account of all or any of the accounts, dues, debts, demands, judgments, rights, credits, and choses, above assigned, giving and granting unto the said attorney full power to do and perform all and every act and thing whatsoever requisite and necessary, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that the said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

In witness whereof, I have hereunto set my hand and seal this day of 18 .
[Signature of Witness.] *[Signature.]*

ASSIGNMENT—ACCOUNT.

Know all men by these presents: That I, A. B. (of _____), in consideration of _____ dollars, the receipt of which is hereby acknowledged, do hereby assign, transfer and set over unto E. F. (of _____) his executors, administrators and assigns, and to his and their own proper use and benefit, all my title and interest in and rights under any and all sum or sums of money now due or to grow due upon the annexed account, or upon the sales, loans, (services, etc.) therein mentioned.

That I do hereby give said E. F. (his executors, administrators and assigns) full authority and power to ask, collect, demand, receive, receipt for, compound and acquit, and in my name or otherwise to institute, prosecute and withdraw any action at law, or suits in equity therefor.

In witness whereof, I have hereunto set my hand and seal this
[Signature of Witness.]

day of _____ 18
[Signature.]

ASSIGNMENT—BILL OF SALE.

Know all men by these presents: That A. B., by his deed and bill of sale, bearing date the _____ day of _____ and which is hereunto annexed, did for the consideration (of _____) therein expressed, bargain, sell and deliver to said C. D. the household goods, implements, and utensils in and about the dwelling house at _____, a schedule of which is attached to said bill of sale hereunto annexed. That said C. D. for a consideration of _____ dollars, does by these presents bargain, sell, assign, and set over to E. F. all and every said goods, implements, and utensils which are in said bill of sale and schedule annexed mentioned, to have and to hold the same forever.

And said C. D. does hereby covenant that said goods, implements, etc., are etc. (The schedule of articles sold.)

In witness whereof, I have hereunto set my hand and seal this
[Signature of Witness.]

day of _____ 18
[Signature.]

ASSIGNMENT—BOND.

Know all men by these presents: That I, A. B., the undersigned, in consideration of the sum of _____ dollars, the receipt of which is hereby acknowledged, do by these presents assign, sell, and transfer unto C. D. his executors, administrators, and assigns, a certain written bond or obligation, and the conditions thereof bearing date the _____ day of _____ A. D. _____, executed by E. F. and W. his wife to said A. B. and all the sum and sums of money due and to grow due thereon, together with all my title and interest in and rights under the same,

In witness whereof, I have hereunto set my hand this

day of _____, A. D. 18
[Signature.]

ASSIGNMENT—DEBT.

I the undersigned A. B. (of _____), in consideration of _____ dollars (the receipt of which I hereby acknowledge), do assign transfer, and set over to E. F. (of _____) a certain debt due owing from C. D. (of _____), for (here state what the debt is for.) amounting to _____ dollars.

I do hereby covenant that said sum of _____ dollars is justly owing and due to me; that there is no counter claim, cross-demand or set-off against the same and that the same is not, nor will be barred by the statute of limitations for _____ from the date hereof. And that I have neither done or shall do anything to discharge or lessen said debt, or hinder said E. F. or his assigns from collecting the same.

In witness whereof, I have hereunto set my hand and seal this
[Signature of Witness.]

day of _____ 18
[Signature.]

ASSIGNMENT—INSOLVENT DEBTOR.

Know all men by these presents: That I, A. B., of _____, am indebted to divers persons and unable to pay the several amounts of their claims in full, and desire to convey all my property for the benefit of all my creditors, without preference or priority. That in consideration of the premises, I do by these presents grant, bargain, sell, assign, transfer and set over unto E. F., all my lands, tenements, hereditaments, goods, chattels, rights, credits and effects of every name, nature and description (saving only such property as is exempt by law from attachments and execution), in trust nevertheless, to sell and dispose of and collect the same, with full power to compound, adjust and settle for the same or any part thereof, and apply the proceeds as follows: To pay all costs and charges of these presents, and the lawful expenses of executing the trust hereby created. To distribute and pay the remainder of said proceeds, ratably and in equal proportions, to my creditors, in satisfaction and release of all debts by me owing. To repay me, my executors, administrators and assigns the residue of said proceeds, if any there be.

In witness whereof, I have hereunto set my hand and seal this
[Signature of Witness.]

day of _____ 18
[Signature.]

ASSIGNMENT—INSOLVENT DEBTOR.

Know all men by these presents:—That this assignment made the _____ day of _____ in the year _____, by A. B. and C. D., partners in trade and business, under the name, style, or firm of B. & D., of the first part, to E. F., of _____, of the second part, witnesseth; That whereas the said copartnership is justly indebted in considerable sums of money, and has become unable to pay and discharge the same with punctuality, or in full: and the said parties of the first part are now desirous of making a fair and equitable distribution of their property and effects among their creditors; Now, therefore, the said parties of the first part, in consideration of the premises, and of the sum of one dollar to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, and sold, released, assigned, transferred and set over, and by these presents do grant, bargain and sell, release, assign, transfer and set over unto the said party of the second part and to his heirs and assigns forever, all and singular the lands, tenements, and hereditaments, situate, lying, and being within the State of _____, and all the goods, chattels, merchandise, bills, bonds, notes, books, accounts, claims, demands, choses in action, books of accounts, judgments, evidence of debt, and property of every name and nature whatever, of the said parties of the first part, more particularly enumerated and described in the schedule hereto annexed, marked "Schedule, A"; to have and to hold the same, and every part and parcel thereof, with the appurtenances to the said party of the second part, his heirs, executors, administrators, and assigns; In trust nevertheless, and to and for the following uses, intents, and purposes, that is to say; that the said party of the second part shall take possession of all and singular the lands, tenements, and hereditaments, property and effects, hereby assigned, and sell and dispose of the same, upon such terms and conditions as in his judgment may appear best, and most for the interest of the parties concerned, and convert the same into money; and also to collect, all and singular the said debts, dues, bills, bonds, notes, accounts, claims, demands, and choses in action, or so much thereof as may prove collectable; and thereupon to execute, acknowledge, and deliver all necessary conveyances and instruments for the purposes aforesaid; and by and with the proceeds of such sales and collections, the said party of the second part shall first pay and disburse all the just and reasonable expenses, costs, charges, and commissions, of executing and carrying into effect this assignment, and all rents, taxes and assessments due or to become due on the lands, tenements and hereditaments aforesaid, until the same shall be sold and disposed of; and by and with the residue, or net proceeds and avails of such sales and collection, the said party of the second part shall:

FIRST.—Pay and discharge in full the several and respective debts, bonds, notes and sums of money due or to grow due from the said party of the first part, or for which they are liable, to the said party of the second part, and the several other persons and firms designated in the schedule hereto annexed, marked "Schedule B," together with all interest moneys due, or to grow due thereon; and, if said net proceeds and avails shall not be sufficient to pay and discharge the same in full, then such net proceeds and avails shall be distributed pro rata, share and share alike, among the said several persons and firms named in said schedule B. according to the amount of their respective claims; and,

SECOND.—By and with the residue and remainder of said net proceeds and avails, if any there shall be, the said party of the second part shall pay and discharge all the co-partnership debts, demands and liabilities whatsoever, now existing, whether due or hereafter to become due, provided such remainder shall be sufficient for that purpose; and, if sufficient, then the same shall be applied pro rata, share and share alike, to the payment of said debts, demands and liabilities, according to their respective amounts; and,

THIRD.—By and with the residue and remainder of the said net proceeds and avails, if any there shall be, the said party of the second part shall pay and discharge all the private and individual and debts of the parties of the first part, or either of them, whether due, or to grow due, provided such remainder shall be sufficient for that purpose; and if insufficient, then the same shall be applied pro rata, share and share alike, to the payment of the said debts, according to their respective amounts; and,

LASTLY.—The said party of the second part shall return the surplus of the said net proceeds and avails, if any there shall be, to the said parties of the first part, their executors, administrators, or assigns.

And for the better execution of these presents, and of the several trusts hereby reposed, the said parties of the first part do hereby make, nominate and appoint the said party of the second part, their, and each of their true and lawful attorney irrevocable, with full power and authority to do, transact, and perform all acts, deeds, matters and things, which can or may be necessary in the premises, as fully and completely as the said parties of the first part, or either of them, might or could do, were these presents not executed; hereby ratifying and confirming all, and everything whatever, our said attorney and attorneys shall do, or cause to be done, in the premises.

The said party of the second part doth hereby accept the trust created and reposed in him by this instrument, and covenants and agrees to and with the said party of the first part, that he will faithfully and without delay execute the created trust according to the best of his skill, knowledge and ability.

In witness whereof, the said parties have hereunto set their respective hands (and seals) the day and year above written.

Signed, sealed and delivered }
in the presence of G. H. }

B. & D. by A. B. { SEAL. }
A. B. { SEAL. }
C. D. { SEAL. }
E. F. { SEAL. }

ASSIGNMENT—INSURANCE POLICY.

[With Agent's Approval.]

The property hereby insured, having been purchased by E. F., the Insurance Company consent that the interest of C. D. in the within policy may be assigned to said purchaser, subject, nevertheless, to all the terms and conditions therein mentioned and referred to.

Dated at this day of 18

[Signature of Insurance Agent.]

For value received, I hereby assign, transfer and set over unto E. F., (and his assigns) all my title and interest in and rights under this policy of insurance, and all benefit and advantage to be derived therefrom.

Witness my hand (and seal) this day of 18

[Signature of Witness.]

[Signature.]

ASSIGNMENT—MONEY ON ACCOUNT.

Know all men by these presents: That A. B. in consideration of the sum of , to him in hand paid, does hereby assign, transfer and set over all his title and interest in and rights under an account for (*state what*) in the sum of , hereunto annexed, and all other sum and sums of money remaining due and payable upon said account, unto E. F. with full power to ask, demand and receive the same (at his own costs and expenses) to his own use, and to give discharges and receipts for the same, or any thereof.

That there is due said A. B. on said account, at the date of these presents, the sum of , and that he has not received or discharged the same.

In witness whereof, I have hereunto set my hand and seal this day of 18
[Signature.]

ASSIGNMENT—MORTGAGE OF REAL PROPERTY.

Know all men by these presents: That I, C. D. of , in County, State of the mortgagee named in a certain mortgage given by A. B. of in County, State of to said C. D., to secure the payment of dollars and interest, dated the day of recorded in the volume , on page of the registry of deeds for the County of in consideration of the sum of dollars to me paid by E. F. of in County, State of the receipt of which is hereby acknowledged, do hereby sell, assign, transfer, set over and convey unto said E. F. his heirs and assigns said mortgage, and the real estate thereby conveyed, together with the promissory note, debt and claim thereby secured, and the covenants therein contained. To have and to hold the same to him, the said E. F. and his heirs and assigns, to his and their use and behoof forever; subject nevertheless to the conditions therein contained (and to redemption according to law).

In witness whereof I have hereunto set my hand (and seal) this day of 18
Executed and delivered }
in presence of } [Signature.] [SEAL]

AUTHENTICATION—COPY OF ACCOUNT.

State of }
County of } s. s.

I hereby certify that (above or foregoing or within) is an exact (exemplified) copy of the administration, or other account of A. B. or A. R. administrator of the estate of D. D., deceased or E. K. executor of the last will and testament of D. D. deceased audited, passed and filed in the office of the , of County, State of

In testimony whereof, I have hereunto set my hand and seal this day of 18
[Signature and Official Title.] [SEAL.]

AUTHENTICATION—COPY OF RECORD.

State of }
County of } s. s.

I hereby certify that the above or annexed (or foregoing, or within) has been carefully compared with verified and is a correct transcript of the whole of (*state what*) as the same appears of record, Vol. Pages of (*state the kind or nature of record*) in the office of the , of , in

In testimony whereof, I have hereunto set my hand and seal this day of 18
[Signature.]

BILL OF SALE—GENERAL FORM WITH WARRANTY.

Know all men by these presents: That in consideration of dollars, the receipt of which is hereby acknowledged, I do hereby grant, sell, transfer, and deliver unto C. D. his heirs, executors, administrators, and assigns the following goods and chattels, viz. (*describing it*)

To have and to hold all and singular the said goods and chattels forever. And said grantor hereby covenants with said grantee that he is the lawful owner of said goods, and chattels; that they are free from all incumbrance and that he has good right to sell the same as aforesaid.

That he will warrant and defend the same against the lawful claims and demands and demand of all persons whomsoever.

In witness whereof, the said grantor has hereunto set his hand this day of
[Signature of Witness.] [Signature.]

BANK FORM—NEGOTIABLE NOTE.

§— Sixty days after date (or, on the day of 18 PHILADELPHIA, PA., —, 18—
(or, we promise, or we jointly and severally promise) to pay to A. B., or order (or, to A. B. or bearer), one thousand dollars (insert with interest, if it is to bear interest), for value received. (also add place of payment if any is understood.)

[Signature of maker.]

BANK FORM—NON-NEGOTIABLE NOTE.

§— Sixty days after date (or otherwise, as above), I promise to pay to A. B. one thousand dollars, for value received, (insert with interest, if it is to bear interest). (Also add place of payment if any is understood.)

[Signature of maker.]

BANK FORM—CERTIFICATE OF DEPOSIT.

B. R. S. & CO., BANKERS.

§— D. R. has deposited with us HARTFORD, CONN., —, 18—
dollars, payable to P. E. (or himself) or order on
return of this certificate.

[Signature of maker.]

BANK FORM—PROTEST NOTICE—GENERAL FORM.

To SPRINGFIELD, MASS., —, 18—
A bill of exchange (or promissory note) drawn (or made) by , in favor of
for dollars, dated the day of , indorsed by , was delivered to me
for protest by the holder being, this day due, its acceptance (or payment) was
demanded and refused. You will be held for its payment.

[Signature of Notary Public.] [SEAL.]

BOND OF OBLIGATION—GENERAL FORM.

Know all men by these presents: That I, A. B., of the town of , in the county
of , and State of , am held and firmly bound unto C. D., of , in the sum of
one thousand dollars to be paid to the said C. D., his executors, administrators or assigns,
for which payment well and truly to be made, I bind myself, my heirs, executors, adminis-
trators firmly by these presents.

Sealed with my Seal, Dated the day of

The condition of the above obligation is such: that if the above bounden A. B., his heirs,
executors or administrators, shall well and truly pay, or cause to be paid, unto the above-
named C. D., his executors, administrators or assigns the just and full sum of five hundred
dollars in five equal annual payments from the date hereof, with annual interest, then the
above obligation to be void, otherwise to remain in full force and virtue.

Sealed and delivered in
presence of }

[Signature.] [SEAL.]

BOND OF OBLIGATION—ANNUITY.

Payment of Annuity for a Term of Years.

Know all men by these presents: That I, A. B., of , county of , and State of
of , am (or we A. B., of , and C. D. of , are) held and firmly bound unto
W. D. widow of D. D. deceased, of the town of , in the county of , and State of
of (or unto D. D. of , and W. D. of , etc.) in the sum of dollars, good
and lawful money of the United States, to be paid to the said W. D., her executors, admin-
istrators or assigns (or to the said D. D. and W. D., their executors, administrators or
assigns,) for which payment, well and truly to be made, I do bind myself, my heirs, execu-
tors and administrators, (or we do bind ourselves, our heirs, executors and adminis-
trators,) jointly or severally and firmly by these presents.

Sealed with my seal (or our seals): dated this day of 18

The condition of the above obligation is such: that if the above bounden A. B., his
(or A. B. C. D., their) heirs, executors or administrators, or any of them, shall yearly and
every year, during the term of years, to be computed from the day of
(last past before) the day of the above written obligation, well and truly pay or cause to
be paid, unto the above named W. D. her executors, administrators or assigns, the annuity
or clear yearly sum of dollars, by even and quarterly or half-yearly portions, paid
at upon the days of the months of in each year, the first payment thereof
to begin and be made on the day of next ensuing the day of the date of this
obligation, and also pay a proportionable part of the said annuity, or clear yearly pay-
ment of , for or in respect of so many days as shall have elapsed from the last half
(or quarter) yearly day of payment next preceeding the decease of the said W. D. up to the
day of her death, then this obligation is to be void; but if default shall be made in payment
of the said annuity or any part thereof, at any of the times aforesaid, then the said
obligation is to remain in full force.

. Executed in the presence of }

A. B. [SEAL.]
(or A. B. [SEAL.]
C. D. [SEAL.]

BOND OF OBLIGATION—INDEMNITY.

To Indemnify Maker of Note or Acceptor of Bill for Accommodation from
Loss Thereby, with Surety.

Know all men by these presents: That we, A. B. of , in county, and State of , in the sum of dollars, good and lawful money of the United States, to be paid to the said C. D., his executors, administrators or assigns; for which payment, well and truly to be made we do bind ourselves our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals: dated this day of .
Whereas the said C. D. has without consideration to him moving therefor and solely for the accommodation of the above bounden A. B. made and advanced to the said A. B. his promissory note (or accepted a bill of exchange) drawn by upon him for dollars bearing date the , day of , and payable to , (with interest) days after the date thereof;

Now the condition of this obligation is such: that if the said above bounden A. B. and B. A., their executors or administrators, or any of them shall well and truly pay the said sum of , dollars, for the payment of which the said note (or bill) is so given, and the interest thereof, on the day of payment therein mentioned, and in full discharge thereof and indemnify and save harmless the said C. D., his executors and administrators, from and against any and all suits, actions, damages, costs, charges and expenses, by reason of said note (or bill) then this obligation is to be void otherwise to remain in full force.

A. B. [SEAL.]
B. A. [SEAL.]

BOND OF OBLIGATION—RESPONDENTIA BOND.

Know all men by these presents: That I, M. R., master (or owner, or master and owner) of the ship or vessel called the V. now lying at the port of , am held and firmly bound unto C. D., of the city of , in the county of , and State of , merchant, (or unto E. F., of , and C. D., of) in the sum of dollars, good and lawful money of the United States, (or other currency in which payment is to be made) to be paid to the said C. D., his executors, administrators or assigns (or to the said E. F. and C. D., their executors, administrators or assigns) for which payment well and truly to be made, I do bind myself, my heirs, executors and administrators, and also the said ship, or vessel her tackle, apparel, and furniture (and freight) firmly by these presents.

Sealed with my seal; dated this day of .
Whereas the above bounden A. B. has (or A. B. or B. A. have) borrowed, taken up and received of the said C. D. the full and just sum of dollars which sum is to run at respondentia on the said ship or vessel (here state the voyage for which the loan is made) at the rate or premium of per cent. for the voyage (or at the rate of per cent. for every calendar month the said ship or vessel shall be out on the said voyage, and so in proportion for a less time than a month) in consideration of which the usual risks of the seas, rivers, enemies, fires, pirates, etc. are to be on the account of the said C. D.; and whereas, for the further security of the said C. D. and said A. B. for and on the account of the owners, their executors, administrators and assigns, has agreed to, and does by these presents mortgage and assign over to the said C. D. the several goods, wares, and merchandise laden and to be laden on the said ship, or vessel; which said goods, wares and merchandise, with their produce, are thus mortgaged and assigned over, for the security of the respondentia taken up by the said A. B. and shall be delivered to no other use or purpose whatever until payment of this bond is first made, with the premium that may become due thereon:

Now the condition of the above obligation is such: that if the above bounden A. B., his heirs, executors and administrators or any of them shall well and truly pay, or cause to be paid, unto the said C. D. or to his attorneys (or to C. D. and E. F. or to their attorneys) at , legally authorized to receive the same or to the executors and administrators of the said E. F. and C. D. the just and full sum of , dollars being the principal of this bond together with the premium which shall become due thereon at the expiration of months after the safe arrival of the said ship or vessel at her moorings in the port of , or in case of the loss of said ship or vessel, such average as by custom shall have become due on the salvage, then this obligation is to be void; otherwise to remain in full force.

Having signed three bonds of the same tenor and date either one thereof being accomplished, the other two are to be of no effect.

Executed in presence of }

[Signature.] [SEAL.]

BROKER'S ORDER—TO BUY (OR SELL) STOCK.

CHICAGO, ILL., — 18 —

B., R. and S., STOCK BROKERS.

Please (buy or sell) for my account and risk
This order good until countermanded.

shares (description).

[Signature.]

BROKER'S RECEIPT—FOR MONEY FOR STOCK.

\$— Received of A. B. dollars, for shares stock.
 To be transferred to . [Signature.]

BROKER'S STATEMENT—OF ACCOUNT, ETC.

CHICAGO, ILL., — 18—
 B., R and S., STOCK BROKERS, etc.
 Bought for A. B.
 100 Shares — \$ —
 " " — —
 Commission 12½ — —
 \$ —
 Received Payment, [Signature.]

BILL OF EXCHANGE—GENERAL FORM.

\$— NORTHAMPTON, MASS., —, 18—
 days (or months) after sight (or date) pay to C., or order, dollars, value
 received on account of . (or and charge to account of)
 To B. (at) . [Signature.]

BILL OF EXCHANGE—AT OR AFTER SIGHT.

No. — NEW HAVEN, CONN., —, 18—
 At Sight (or days after sight) pay to the order of P. E. dollars, and charge
 the same to the account of
 To D. E. at . [Signature.]

BILL OF EXCHANGE—SET OF FOREIGN.

1.
 EXCHANGE FOR £ STERLING. LONDON, ENG., —, 18—
 after of this, First of exchange (second and third unpaid) pay to the order
 of P. E., value received and charge the same to account of
 To D. E. at . [Signature.]
 No. —

BILL OF LADING—DOMESTIC.

For Freight, Adams Express Company.

Received of (consignor or shipper's name).

Value dollars. (or asked and not given.)

For which this Company charges (give amount).

Marked (consignee's name and other directions, marks and figures).

Which it is mutually agreed is to be forwarded to our agency nearest or most convenient to destination only and there delivered to other parties to complete the transportation.

It is part of the consideration of this contract and it is agreed that the said Express Company are forwarders only and are not to be held liable or responsible for any loss or damage to said property while being conveyed by the carriers to whom the same may be by the said Express Company intrusted, or arising from the dangers of railroads, ocean or river navigation, steam, fire in stores, depots, or in transit, leakage, breakage, or from any cause whatever, unless, in every case, the same be proved to have occurred from the fraud or gross negligence of said Express Company or their servants; nor in any event shall the holder hereof demand beyond the sum of fifty dollars at which the article forwarded is hereby valued, unless otherwise herein expressed or unless specially insured by them, and so specified in this receipt which insurance shall constitute the limit of the liability of the Adams Express Company. And if the same is intrusted or delivered to any other express company or agent (which said Adams Express Company are hereby authorized to do) such company or person so selected shall be regarded exclusively as the agent of the shipper or owner, and as such alone liable, and the Adams Express Company shall not be, in any event, responsible for the negligence or non-performance of any such Company or person, and the shipper and owner hereby severally agree that all the stipulations and conditions in this receipt contained shall extend to and inure to the benefit of each and every company and person to whom the Adams Express Company may intrust or deliver the above described property for transportation, and shall define and limit the liability thereof of such other company or person. In no event shall the Adams Express Company be liable for any loss or damage, unless the claim therefore shall be presented to them in writing, at this office, within thirty days after this date; in a statement to which this receipt shall be annexed. All articles of glass or contained in glass, or any of a fragile nature, will be taken at shipper's risk only, and the shipper agrees that the Company shall not be held responsible for any injury by breakage or otherwise nor for damage to goods not properly packed and secured for transportation. It is further agreed, that said Company shall not, in any event, be liable for

any loss, damage or detention caused by the acts of God, civil or military authority, or by rebellion, piracy, insurrection, or riot, or the dangers incident to the time of war, or by any rioters or armed assemblage. If any sum of money besides the charge for transportation, is to be collected from the consignee on delivery of the above described property, and the same is not paid within thirty days from the date hereof, the shipper agrees that this Company may return said property to him at the expiration of that time, subject to the conditions of this receipt, and that he will pay the charges for transportation both ways, and that the liability of this Company for such property while in its possession for the purpose of making such collection, shall be that of warehousemen only.

Freight paid (or collect).

For the Company.

[Signature.]

BILL OF LADING—FOREIGN.

Freight, Money etc. American Express.

NEW YORK, N. Y., U. S. A., —, 18—

Received of

One Box (or package, etc.) Value \$

Numbered and marked as in the margin, to be forwarded by us only to
as per address in "Marks and numbers".

It is agreed, and is part of the consideration of this contract, that said Company are not to be held responsible, except as forwarders, nor for any loss or damage arising from danger of fire, at sea or on shore, accidents from machinery, boilers, steam, leakage, or any other accidents or dangers of the seas, rivers and steam navigation, of whatever nature or kind soever, or by dangers of railroads, restraint of princes or potentates, or for any cause whatever, unless the same be proved to have occurred from the fraud or gross negligence of ourselves, our agents or servants, and we, in no event, be liable beyond our route, as herein receipted. Valued under fifty dollars, unless otherwise herein stated. Not accountable for specie, jewelry or precious stones, unless value is declared. Not accountable for leakage or breakage. Contents unknown.

Marks and numbers.

Freight, \$:
Insurance, \$:

[Signature.]

Total, \$.

Duties and customs charges payable by consignee at destination.

For F. S. and Company, Forwarders,

[Signature of Agent.]

CONDITION—TO INDEMNIFY ON PAYING A LOST NOTE OR BILL.

Whereas a promissory note for _____ dollars made by _____ (or a bill of exchange drawn by _____, upon _____, bearing date at _____ the _____ day of _____, and payable _____ months after the date to the order of _____, at _____ and indorsed by _____, and which is now the property of the above bounden A. B. has been lost (or destroyed) and cannot now be produced by him; and whereas at his request and upon his promise to indemnify and save the harmless the said C. D. in the premises, and to deliver up the said note, when found to the said C. D. to be cancelled the said C. D. has this day paid unto the said A. B. the sum of _____ dollars the receipt whereof the said A. B. doth hereby acknowledge in full satisfaction and discharge of the said note:

Now the condition of the above obligation is such: that if the above bounden A. B. and E. F. their heirs, executors, or administrators, or any of them shall well and truly indemnify and save harmless the said C. D. his executors and administrators from and against the said note (or bill) any and all damages, costs, charges and expenses and all actions of suits, whether groundless or otherwise by reason of said note (or bill) and also deliver or cause to be delivered up the same when and so soon as the same shall be found, to be cancelled then this obligation is to be void, otherwise to remain in full force.

A. B. [SEAL.]

E. F. [SEAL.]

CONTRACT—GENERAL FORM.

With Liquidations Damages etc.

This agreement made this _____ day of _____, A. D. _____, by and between A. B. of _____, as party of the first part, and L. M. of _____, as party of the second part witnesseth:

That said party of the first part for the consideration hereinafter mentioned covenants and agrees with said party of the second part, to (here state the agreement.)

In consideration of which said party of the second part covenants and agrees with said party of the first part to (here state the agreement).

And for the true and faithful performance of each and all the covenants and agreements above mentioned said parties bind themselves each to the other in the sum of _____, as liquidated damages to be paid by the failing party.

In witness whereof, the parties to these presents have hereunto set their hands, the day and year first above written.

A. B.

L. M.

CONTRACT—CHARTER PARTY.

General Charter.

This charter party, made and concluded upon in the city of _____, the day of _____, in the year of our Lord one thousand eight hundred and _____ between M. R. of the _____ of _____, of the burthen of _____ tons or thereabouts, register measurement now lying in the harbor _____, of the first part and S. R. of the second part, witnesseth.

That party of the first part agrees on the freighting and chartering of the whole of the said vessel with the exception of the deck, cabin and necessary room for the crew and for storage of provisions, sails and cables or sufficient room for the cargo hereinafter mentioned unto said party of the second part for a voyage from _____ unto _____, on the terms following:

The said vessel shall be tight, staunch, strong and in every way fitted for such voyage and receive on board during the aforesaid voyage the merchandise hereinafter mentioned and no goods or merchandise shall be laden on board otherwise than from the said party of the second part doth engage to provide and furnish to the said vessel _____ And to pay to the said party of the first part, or agent, for the use of said vessel during the voyage aforesaid (\$ _____). It is agreed that the lay days of loading and discharging the vessel shall be as follows, commencing from the time the captain reports himself ready to receive or discharge cargo: _____ And that for each and every days detention by default of said party of the second part, or agent, _____ dollars per day, day by day shall be paid by said party of the second part, or agent to said party of the first part, or agent. The cargo or cargoes to be received and delivered alongside within reach of vessel's tackle.

A commission of _____, per cent. upon the gross amount of this charter payable by the vessel is due to _____ upon the signing thereof.

To the true and faithful performance of all and every foregoing agreement we the said parties do hereby bind ourselves, our heirs, executors, administrators and assigns each to the other in the penal sum of _____. In witness whereof we hereunto set our hands the day and year first above written.

Signed in the presence of _____

M. R.
S. R.

CONTRACT—EMPLOYMENT.

Clerk or Workman.

This agreement, etc., witnesseth:

That A. B. shall enter the service of C. D. as clerk (or whatever capacity it may be).

That said A. B. shall faithfully, honestly, and diligently perform the duties of _____ in the _____ of said C. D., and well and truly obey all the reasonable commands and wishes of said C. D. during the space of _____ from this date.

That he will guard the interests and keep the secrets of his employer, absenting himself only upon said employer's consent.

That said C. D. in consideration of said services for said A. B. pay him a yearly sum of five hundred dollars, in equal quarterly payments on the first days of January etc.

In witness whereof the parties to these presents have hereunto set their hands, the day and year first above written.

A. B.
C. D.

CONTRACT—SALE.

Stock and Good Will with Restraint.

This agreement etc., witnesseth:

That said A. B. for the consideration hereinafter mentioned shall sell to said C. D., all the stock of goods, wares and merchandise belonging to said A. B., now in the _____ store occupied by him in _____, together with all furniture and fixtures thereunto appertaining and also all goods, wares and merchandise bought or contracted for by said A. B. and intended for said store together with the good will of the business heretofore carried on there by said A. B.

That said stock of goods, wares and merchandise shall be inventoried by said A. B. at its original costs for carriage or transportation, and making deduction for depreciation in value from damage, ware, tear or other causes. That all the furniture and fixtures shall be inventoried at their fair cash value.

The said inventory shall be completed within _____ days from the date hereof and the property above specified thereupon immediately delivered to said C. D.

That said A. B. shall not at any time hereafter within _____ from said place of business now occupied by him engage directly or indirectly, either as agent, principal, servant or otherwise in carrying on, conducting, or being interested in said business of _____.

That said C. D. in consideration thereof shall pay said A. B. the sum of _____ dollars as follows: _____ dollars upon the delivery of said goods, wares, merchandise, furniture and fixtures, _____ dollars on the _____ day of _____ next in full payment thereof which sum shall by the promissory note payable at _____ and bearing interest at the rate _____ per cent. per annum from date until paid.

In witness whereof, the parties to these presents have hereunto set their hands, the day and year first above written.

A. B.
C. D.

CONTRACT—INSURANCE.

Renewal of Policy.

INSURANCE COMPANY OF

No. —.

In consideration of the sum of dollars received of A. B. as premium on policy
 No. , for dollars, the same is continued in force for the term of , from
 the day of , A. D. 18 , at noon until the day of A. D. 18 , at noon.
 PLACE, —, 18—

INSURANCE COMPANY.

[Signature of Agent.]

CONTRACT—INSURANCE.

To Effect or Procure Insurance. [See Title Assignment Post]

This agreement etc., witnesseth:

That (*stating the causes that make insurance necessary*).

That said A. B. will because of said premises insure or cause the same to be insured in such companies as C. D. shall designate.

That in default of said insurance on or after the day of , said C. D. may effect the same at the costs and expense of said A. B. and all costs and charges proper and necessary in effecting the same together with interest thereon at the rate of per cent. per annum shall be a lien upon and charge against said , to be included in and become a part of any judgment effected against the same by reason of the premises.

In witness whereof, the parties to these presents have hereunto set their hands, the day and year first above written

A. B.
 C. D.

DEED—CONVEYANCE WARRANTY.

With Full Covenants.

This indenture made this day of in the year , between A. B. of county, in the State of (and W. B. his wife) of the first part and C. D. of , in the State of , of the second part witnesseth:

That the said party (or parties) of the first part, in consideration of the sum of dollars lawful money of the United States, to him (or to them) paid by the said parties of the second part, at or before the (sealing and) delivery of these presents, the receipt whereof is hereby acknowledged and the said party of the second part his heirs, executors and administrators, forever, released and discharged from the same by these presents: has and by these presents does (or do) grant, bargain, sell, alien, remise, release, convey and confirm unto the said party of second part, and to his heirs and assigns, forever, all (*here follows the description of these premises*) together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also all the estate, right, title interest (dower and right of dower) property, possession, claim and demand whatsoever, both in law and in equity, of the said party (or parties) of the first part, of, in and to the above granted premises, and every part and parcel thereof, with the appurtenances.

To have and to hold and singular the above granted premises together with the appurtenances and every part thereof, unto the said party of the second part, his heirs and assigns forever. (*If there is any encumbrance state it thus:* subject, however, to a certain indenture of mortgage for dollars, and dated , and recorded in the office of , in mortgage record at page , and also subject etc.)

And the said A. B. (*naming only the party who warrants*) for himself, his heirs, executors and administrators, does covenant, promise and agree, to and with the said party of the second part, his heirs and assigns, that the said A. B. at the time of the (sealing and) delivery of these presents, is lawfully seized in his own rights, (*or otherwise, as the case may be*) of a good, absolute and indefeasible estate of inheritance, in fee simple, of and in all and singular the above granted and described premises, with the appurtenances if conveyed subject to encumbrance say, subject as aforesaid, and has good right, full power and lawful authority to grant, bargain, sell and convey the same in manner aforesaid. And that the said party of the second part, his heirs and assigns, shall and may at all times hereafter peaceably and quietly have, hold, use, occupy, possess and enjoy the above granted premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the said party (or parties) of the first part, his (or their) heirs or assigns, or of any other person or persons lawfully claiming or to claim the same; and that the same now are free, clear, discharged and unencumbered of and from all former grants, titles, charges, estates, judgments, taxes, assessment and encumbrances of what nature or kind, (*if conveyed subject to an encumbrance say,* except as aforesaid).

And also, that the said party (or parties) of the first part, and his (or their) heirs, and all and every other person or persons whomsoever, lawfully or equitably, deriving any estate, right, title or interest of, in or to the above granted premises, by, from, under or in trust for him, (or them) shall and will at any time or times hereafter, upon the reasonable request, and at the proper costs and charges in the law, of said party of the second part, his heirs, assigns, make, do and execute, or cause or procure to be made done and executed, all and every such further and other lawful and reasonable acts, conveyances and assurance in the law for the better and more effectually vesting and confirming the premises hereby granted, or intended so to be in and to the said party of the second part, his heirs and assigns, forever, as by the said party of the second part, his heirs and assigns, or his (or their) counsel learned in the law, shall be reasonably devised, advised or required. And the said A. B. (*name party who warrants*) and his heirs, the above described and hereby granted and released premises, and every part and parcel thereof, with the appurtenances, unto the said

party of the second part, his heirs and assigns, against the said parties of the first part and their heirs, and against all and every person and persons whomsoever, lawfully claiming or to claim the same, shall and will warrant, and, by these presents forever defend.

In witness whereof, the said party (or parties) of the first part has (or have) hereunto set his hand and seal (or their hands and seals) the day and year first above written.

Signed, sealed, acknowledged and delivered }
in the presence of witnesses }

[Signatures.] [SEALS.]

GUARANTY OF PERFORMANCE.

For a good and valuable consideration by us received we, the undersigned, do hereby guarantee a faithful compliance with the terms of the above agreement upon the part of the said A. B.

S. R. {SEAL.}
T. Y. {SEAL.}

INVOICE.

To—, SPRINGFIELD, MASS., —, 18—
Receive and forward, subject to conditions of bill of lading attached, as follows;
Marks.

Number and description of packages,
Weight,

[Signature of shipper.]

LEASE—SURETY.

[Suretyship, Agreement.]

In consideration of the letting of the premises above described, and for the sum of one dollar I, the undersigned, do hereby become surety for the punctual payment of the rent, and performance of the covenants in the within written agreement mentioned, to be paid and performed by the within named tenant; and if any default shall be made therein I do hereby promise and agree to pay on demand, unto the written named landlord, such sum or sums of money as will be sufficient to make up such deficiency, and fully satisfy the conditions of said agreement, without requiring any notice of non-payment, or proof of demand being made.

Given under my hand and seal, this day of , A. D. 18
[Surety's Signature.] [SEAL.]

LEASE—GENERAL FORM.

This (agreement, conveyance, indenture or) lease, made this day of , between A. B. of party of the first part and C. D., of , party of the second part, witnesseth: That the said party of the first part does by these presents lease to the said party of the second part the following described property, to wit: (*here describe the property.*)

To have and to hold the same to the said party of the second part, from the day of to the day of .

And the said party of the second part covenants and agrees with the party of the first part to pay the said party of the first part, as rent for the same, the sum of dollars, payable as follows, to wit: (*state the times and terms of payment.*)

The said party of the second part further covenants with the said party of the first part, that at the expiration of the time mentioned in this lease, peaceable possession of the said premises shall be given to said party of the first part, in as good condition as they now are the usual wear, inevitable accidents, and loss by fire excepted; and that upon the non-payment of the whole or any portion of the said rent at the time when the same is above promised to be paid, the said party of the first part may at his election, either distrain for said rent due, or declare this lease at an end, and recover possession as if the same was held by forcible detainer; the said party of the second part hereby waiving any notice of such election, or any demand for the possession of said premises.

The covenants herein shall extend to and be binding upon the heirs, executors and administrators of the parties to this lease.

In witness whereof, the parties hereto have hereunto set their hands and affixed their seals the day and year first above written.

[Signature of lessor.] [SEAL.]
[Signature of lessee.] [SEAL.]

LEASE—FARM.

[Year to year, Mode of Husbandry, etc., Memorandum.]

This agreement, conveyance and indenture or lease made this day of , between A. B., of , of the one part and C. D., of , of the other part, witnesseth:

That said A. B. lets, and the said C. D. agrees to take and hold of him as tenant, all that, etc., situate, etc. From day of next ensuing, upon the terms following that is to say:

Said tenant shall be deemed as tenant from year to year;

That said tenant enter and take possession of said premises on next;

That either party may determine the tenancy by a notice in writing, months before the expiration of any year from the day of next preceding;

That said tenant shall go out of possession at the expiration or termination of his term; That the rest of said premises shall be dollars per annum, payable in half yearly payments on, etc., without deduction on account of any tax or assessment now in existence or hereafter to be imposed, except, etc., which is to be paid by the said C. D.;

That the said tenant agrees to cause the following repairs to be made, (*here state what repairs*) and to keep the buildings in a tenaftable repair;

That said tenant agrees to keep the gates and fences in good repair, said tenant finding rough timber or fencing stuff;

That said tenant shall not lop or cut any oak etc. on the estate, except such as have usually been lopped, and those only to be used for making and repairing the fences to the estate etc.;

That said tenant shall not mow any grass or meadow land above once in any one year of his tenancy, and if he breaks up any old meadow or old pasture lands, unless with the said landlord's consent, in writing then he shall pay the further yearly rent of dollars for every acre so broken up and after that rate for any part of an acre.

That said tenant may crop the arable land in each year as follows, viz: one equal third part thereof with wheat or barley, one other third equal part with beans, pease, clover, or oats, etc., and the remaining third part to lie in fallow.

That said land shall not be cropped with wheat twice, or barley twice, in any period of three years.

That the said tenant shall use and consume on the farm all hay and straw made and grown thereon.

That said tenant shall use and spread dung and manure arising or made on the farm, in such manner as that every acre in tillage of the farm aforesaid may be well manured once in every three years of his tenancy (except that all hay and wheat straw on the farm unconsumed at the expiration of the tenancy may be purchased by the landlord or succeeding tenant, at a fair valuation by two indifferent persons, one to be named by each party).

That said tenant shall leave on the premises, without compensation, not only all cut and white straw arising upon or from the premises and remaining unconsumed thereon at the expiration of his tenancy, but also all dung and manure arising or made on the farm, and then remaining unconsumed.

That said tenant shall keep clean, by well hoeing twice at the least and weeding all the land whilst cropped with beans, pease, clover, etc.

That said tenant shall endeavor to prevent any injury by persons, cattle or sheep, to any of the hedges, or trees, or fences, and to preserve the same, and not to do any injury to timber or any other trees in taking such loppings as before allowed to him;

That said tenant shall not crop or sow any of the land with rape, flax, hemp, etc.

That said tenant shall not underlet or assign the premises or any part thereof, except etc.

That said tenant on quitting the farm shall receive such pecuniary compensation for improvements in fencing etc., as to arbitrators one of which arbitrators shall be nominated by each party and if either neglect to nominate his arbitrator the other party made nominate both arbitrators shall award, which arbitrators shall abate according to the benefit derived by the tenant from such repairs, improvements and additions, and take into consideration how far, at the expiration of the tenancy, they may be beneficial to the estate.

In witness whereof, the parties hereto, have hereunto set their hands and affixed their seals the day and year first above written.

A. B.
C. D.

LEASE—GROUND.

This (agreement, conveyance, indenture or) lease made this day of , by and between A. B. of , party of the first part, and C. D. of , party of the second part witnesseth:

That the said party of the first part for and in consideration of the covenants and agreements hereinafter mentioned, to be kept and informed by the party of the second part, has demised and leased to the party of the second part all those premises situated in the of , in , county, and State of , known and described as follows, to wit: (*here give the description of the premises*).

To have and to hold the above described premises, with the appurtenances, unto the party of the second part, from the day of , for, during and until the day of .

And the party of the second part, in consideration of the leasing of the premises aforesaid, does covenant and agree with the party of the first part.

That he will pay to the party of the first part as rent for said leased premises at the office , in , the sum of (*state the annual rent*) April, July, October and January, (*or otherwise*) in each year.

That the said party of the second part will pay or cause to be paid, all water rates and all taxes and assessments that may be laid, charged or assessed on said demised premises, pending the existence of this lease.

That if any time after any tax, assessment or water rate shall have become due or payable, the party of the second part, or his legal representative, shall neglect to pay such water rates, tax or assessment, it may be lawful for the party of the first part to pay the same at any time thereafter, and the amount of any and all such payments so made by the party of the first part shall be deemed and taken, and are hereby declared to be so much additional and further rent, for the above demised premises, due from and payable by the party of the second part; and may be collected in the same manner, by distress or otherwise as is hereinafter provided for the collection of other rents to grow due thereon;

That the whole amount of rent reserved, and agreed to be paid for said above demised premises, and each and every instalment thereof, shall be and is hereby declared to be a valid and first lien upon any and all buildings and improvements on said premises, or that may at any time be erected, placed, or put on said premises by said party of the second part, or his heirs, executors and administrators or assigns and upon his or their interest in this lease, and the premises hereby demised.

That whenever, and as often as any instalment of rent or any other amount above declared to be deemed and taken as rent, shall become due and remain unpaid for one day after the same becomes due and payable said party of the first part, his heirs, executors, administrators, agent, attorney or assigns, may sell at public auction to the highest bidder for cash after having first given ten days notice of the time and place of such sale in some newspaper published in , all the buildings and improvements on said premises, and all the right, title and interest acquired by said party of the second part, under this lease, to the premises herein described, and as the attorney of said party of the second part hereby irrevocably constituted, may make to the purchasers thereof a suitable and proper transfer bill of sale or deed of the same and out of the proceeds arising from such sale, after first paying all costs and expenses of such sale, including commissions and attorneys fees, retain to himself the whole amount due on said lease, up to the date of said sale, rendering the surplus (if any) to said party of the second part, his heirs, executors, administrators, agent, attorney, or assigns, which sale shall be a perpetual bar to and against all rights and equities of said party of the second part, his heirs and assigns, in and to the property sold.

That, at the expiration of the time in this lease mentioned, said party of the second part will yield up said leased premises to the party of the first part in as good condition as when the same were entered upon by the party of the second part, loss by fire or inevitable accident and ordinary wear excepted.

That neither said party of the second part nor his legal representatives will underlet said premises or any part thereof, or assign this lease without the written assent of said party of the first part first had and obtained thereunto, nor use or suffer them to be used for any purpose calculated to injure the reputation of the premises or of the neighborhood or to impair the value of the surrounding neighborhood property for present use or otherwise. It is expressly understood and agreed, by and between the parties aforesaid.

That if the rent above reserved, or any part thereof shall be behind or unpaid on the day of payment whereon the same ought to be paid, as aforesaid or if default shall be made in any of the covenants herein contained to be kept by the party of the second part, his executors, administrators or assigns, it shall and may be lawful for the party of the first part, or his heirs, executors, administrators, agent, attorney or assigns, at his or their election, to declare said term ended, and into the said demised premises, or any part thereof, either with or without process of law, to re-enter, and the party of the second part, or any other person or persons occupying, in or upon the same, to expel, remove and put out, using such force as may be necessary in so doing, and the said premises again to repossess and enjoy as of his or their first and former estate; and to distrain for any rent that may be due thereon, upon any property belonging to the party of the second part, whether the same be exempt from execution and distress by law or not; and the party of the second part, in that case hereby waives all legal rights which he now has, or may have, to hold or retain any such property under any exemption laws now in force in this State, or in any other way.

That it is intended hereby to give the party of the first part, his heirs, executors, administrators, agent, attorney or assigns a valid and first lien, upon any and all the goods, chattels or other property belonging to the party of the second part, as security for the payment of said rent, in manner aforesaid, anything hereinbefore contained to the contrary notwithstanding.

That if at any time said term shall be ended at such election of said party of the first part, or his heirs, executors, administrators, agent, attorney or assigns, as aforesaid, or in any other way, the party of the second part does hereby covenant and agree to surrender and deliver up said above described premises and property, peaceably, to the party of the first part, or his heirs, executors, administrators, agent, attorney or assigns, immediately upon the determination of said terms, as aforesaid.

That if the said party of the second part, or his legal representatives, shall remain in possession of the same one day after notice of such default, or after the termination of this lease, in any of the ways above named, he or they shall be deemed guilty of a forcible detainer of the premises, and shall be subject to all the conditions and provisions above named, and to eviction and removal, forcibly or otherwise, with or without process of law, as above stated.

That neither the right given in this lease, to said party of the first part, to collect the rent that may be due under the terms of this lease by sale, nor any proceedings under the same, shall in any way effect the right of said party of the first part to declare this lease void and the term hereby created ended, as above provided upon default made by said party of the second part.

That said party of the first part hereby waives his right to any notice from said party of the second part, of his election to declare this lease at an end, under any of its provisions, or any demand for the payment of rent, or the possession of premises leased herein; but the simple fact of the non-payment of the rent reserved shall constitute a forcible entry and detainer as aforesaid.

That said party of the second part shall not remove any buildings or other improvements from said premises without written consent of said party of the first part.

That the said second party shall pay and discharge all costs and attorneys fees and expenses that shall arise from enforcing the covenants of this indenture by the party of the first part.

It is further understood and agreed, that all the conditions and covenants contained in this lease shall be binding upon the heirs, executors, administrators and assigns of the parties to these presents respectively.

In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered }
in presence of }

A. B. { SEAL. }
C. D. { SEAL. }

MORTGAGE, ETC.—BOND.

[Secured by a Mortgage.]

Know all men by these presents; That I, A. B., of _____, in _____ county and State of _____, am held and firmly bound unto C. D., of _____, in _____ county and State of _____, in the sum of *(insert the amount of the penalty, usually twice as much as the actual debt)* to be paid to the said C. D., his heirs, executors, administrators or assigns, and to this payment I hereby bind myself, my heirs, executors and administrators, firmly by these presents.

Sealed with my seal this _____ day of _____

The condition of the above obligation is: that if I, the said A. B. or my heirs, executors or administrators, shall pay or cause to be paid unto the said C. D. the sum of *(here insert the actual amount of debt or the sum to be secured)* on the _____ day of _____, with interest at the rate of _____ per cent per annum, payable six months from the date hereof, and every _____ months afterwards, until the said sum is paid, then the above obligation shall be of no effect; and otherwise it shall remain in full force. And I further agree and covenant that if any payment of interest be withheld or delayed for _____ days after such payment shall fall due the said principal sum and all arrearage of interest thereon, shall be and become due immediately on the expiration of _____ days, at the option of said C. D., his executors, administrators or assigns.

Executed and delivered in }
the presence of }

A. B. [SEAL.]

MORTGAGE—REAL PROPERTY.

[In which the mortgagor waives his right on his default for thirty days *(or any other stated period)*, to pay any interest falling due, the whole debt, principal and interest, shall become due and collectible immediately, and the mortgagee shall have the right to proceed to collect the whole sum due.]

This (conveyance, or indenture, or) mortgage made the _____ day of _____, in the year of our Lord _____, between A. B., of the city of _____, in _____ county and State *(or commonwealth)* of _____, of the first part, and C. D., of said city, county and State *(or commonwealth)* aforesaid, of the other part witnesseth:

That whereas the said A. B. in and by a certain obligation *(or writing obligatory)*, under his hand and seal duly executed, bearing even date herewith, stands bound unto the said C. D. in the sum of five thousand dollars, lawful money of the United States of America, conditioned for the payment of the just sum of two thousand and five hundred dollars, like lawful money as aforesaid, in *(five)* years from the date thereof, together with lawful interest for the same, the first payment of interest to be made on _____ day of _____ next ensuing the date thereof, and thereafter *(half-yearly)* from that day without any fraud or further delay:

Provided, however, and it is thereby expressly agreed:

That if at any time default shall be made in the payment of interest on said principal for the space of thirty days after any payment thereof shall fall due, then and in such case the whole principal debt aforesaid shall, at the option of the said C. D., or his executors, administrators, or assigns, become due and payable immediately, and payment of said principal and all interest thereon may be enforced and recovered at once, any thing therein contained to the contrary thereof notwithstanding, as in and by the said in part recited obligation and the condition thereof, relation being thereunto had, may more fully and at large appear:

That the said A. B., as well for and in consideration of the aforesaid debt or sum of two thousand and five hundred dollars and for the better securing the payment of the same, with interest, unto the said C. D., his heirs, executors, administrators, and assigns, as well in discharge of the said in part recited obligation as for and in consideration of the further sum of one dollar, unto the said A. B. in hand well and truly paid by the said C. D. at and before the sealing and delivery hereof, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, enfeoffed, released and confirmed, and by these presents doth grant, bargain, sell, alien, enfeoff, release and confirm unto the said C. D. and his heirs and assigns, all that messuage, piece or parcel of land, etc., *(here give the description of the land conveyed)*, together with all and singular the rights, liberties, privileges, improvements, hereditaments and appurtenances whatsoever thereunto belonging, or in any wise appertaining, and the reversions and remainders, rents, issues and profits thereof.

To have and to hold the said messuage, piece or parcel of land above described, hereditaments and premises hereby granted, or mentioned or intended so to be, with the appurtenances, unto the said C. D., his heirs and assigns, to and for the only proper use and behoof of the said C. D., his heirs and assigns forever.

Provided always, nevertheless, that if the said A. B., his heirs, executors, administrators, or assigns, do and shall well and truly pay or cause to be paid unto the said C. D., his executors, administrators, or assigns, the aforesaid debt or sum of two thousand five hundred dollars on the day and time hereinbefore mentioned and appointed for payment of the same, together with lawful interest as aforesaid, without any fraud or further delay, and without any deduction, defalcation, or abatement to be made of any thing for or in respect of any taxes, charges or assessment whatsoever, that then and from thenceforth as well this present indenture and the estate hereby granted, as the said in part recited obligation, shall cease, determine and become void, anything hereinbefore contained to the contrary thereof in any wise notwithstanding.

Provided further, in case of default in the payment of the interest at any time falling due, for the space of thirty days as aforesaid, or any part thereof, that thereupon it shall be lawful for the said C. D., his executors, administrators, or assigns, to sue out forthwith

a writ of *scire facias* upon this present indenture of mortgage and to proceed at once thereon to recover the principal moneys hereby secured, and all interest thereon, according to law, without further stay, any law or usage to the contrary notwithstanding.

And further, the said mortgagor doth hereby for himself, his heirs, executors, administrators and assigns, expressly waive, relinquish and dispense unto C. D., the said mortgagee, his heirs, executors, administrators and assigns, all and every provision and provisions in the Act of Assembly (or Legislature) of the State (or commonwealth) of (approved or) passed on the day of , entitled "An Act," etc., so far as the same may exempt the same hereby mortgaged lot of land and appurtenances, and any part thereof, from levy and sale, by virtue of any writ of execution that may be issued upon any judgment that may be obtained or entered in any action for the recovery of the mortgage money herein mentioned to be paid, and any interest due thereon, and of the costs of such action and execution; so that it shall be lawful for C. D., the said mortgagee, his heirs, executors, administrators or assigns to proceed by execution to levy upon and sell the said hereby mortgaged lot of ground, any part thereof, with the appurtenances as aforesaid, in the same manner and to the same extent, and to the same effect, to all intents and purposes as if the said Act of Assembly (or Legislature) had not been (approved or) passed.

In witness whereof the said parties to these presents have interchangeably set their hands and seals hereunto. Dated this day and year first above written.

[Signatures of witnesses.]

[Signatures.] [SEALS.]

MORTGAGE—REAL PROPERTY.

[Discharge or Release. See Release, etc., Satisfaction, etc., below.]

State of , county of , ss.
I, C. D., of , in county, State of , do hereby certify that a certain mortgage, bearing date the day of made and executed by A. B., of in county, State of , of and upon the following described premises, to wit: (describing them), and recorded in the office of , in county, State of , in book of mortgages, page on the day of , at o'clock in the M. is paid. And I do hereby consent that the same be discharged of record.
Dated the day of
Executed in presence of } C. D. [SEAL.]

MORTGAGE—REAL PROPERTY.

[Release of a Part.]

This mortgage made this day of , between C. D., of in county, State of , party of the first part, and A. B., of in county, State of , party of the second part:

Whereas, the said party of the second part by indenture of mortgage, bearing date the day of for the consideration therein mentioned, and to secure the payment of the money therein specified, did convey certain lands and tenements, of which the lands hereinafter described are part, unto the said party of the first part:

And whereas, the said party of the first part at the request of the said party of the second part has agreed to give up and surrender the lands hereinafter described unto the said party of the second part, and to hold and retain the residue of the mortgaged lands as security for the money remaining due on the said mortgage,

Now this indenture witnesseth:

That the said party of the first part, in pursuance of the said agreement, and in consideration of dollars to him duly paid at the time of the execution and delivery of these presents, the receipt of which is hereby acknowledged, has and by these presents does grant, release, quitclaim and set over unto the said party of the second part, all that part of the said mortgaged land (describing all that part of the mortgaged land which it is intended to release accurately and carefully, distinguishing it from that which is retained), together with the hereditaments and appurtenances thereto belonging; and all the right, title and interest of the said party of the first part, of and to the same, to the intent that the lands hereby conveyed may be discharged from the said mortgage, and that the rest of the lands in the said mortgage specified may remain to the said party of the first part as heretofore. To have and to hold the lands and premises hereby released and conveyed to the said party of the second part and heirs and assigns, to his and their use and benefit forever, free, clear and discharged of and from all lien and claim under and by virtue of the indenture of mortgage aforesaid.

In witness whereof the said party of the first part has hereunto set his hand (and seal) the day of .

Executed and delivered }
in presence of }

C. D.

[For form of Acknowledgment see that title.]

MORTGAGE—DISCHARGE OF REAL PROPERTY.

State of New York, } ss.
County of }

Do hereby certify, that a certain indenture of mortgage bearing date the day of , one thousand eight hundred and made and executed by and recorded in the office of , county of in Liber of mortgages, page on the day of in the year one thousand eight hundred and o'clock in the is paid. And I do hereby consent that the same be discharged of record.

Dated the day of 18 .
In presence of }

[Signature.] [SEAL.]

MORTGAGE—DISCHARGE OF CHATTEL PROPERTY.

State of New York, } s.s.
County of }

Do hereby certify, that a certain indenture of mortgage bearing date the _____ day of _____, one thousand eight hundred _____ and _____ made and executed by _____ of _____ and filed in the office of _____ county of _____ on the _____ day of _____ in the year one thousand eight hundred and _____ o'clock in the _____ is paid. And I do hereby consent that the same be discharged of record.

Dated the _____ day of _____ 18 _____.

In presence of }

[Signature.] [SEAL.]

State of _____ } s.s.
County of _____ }

On the _____ day of _____ in the year one thousand eight hundred and _____ before me personally came _____, to me known, and known to me to be the individual described in, and who executed the foregoing instrument, and _____ acknowledged that he executed the same.

MORTGAGE—PERSONAL PROPERTY OR CHATTEL MORTGAGE.

Know all men by these presents: That I, A. B., of _____, in consideration of the sum of _____ dollars to me paid by C. D., of _____, by these presents do grant, transfer and assign unto the said C. D. all the goods and chattels, wares, effects and merchandise mentioned and specified in the schedule hereunder written:

To have and to hold, all and singular, the said goods, chattels wares, effects, and merchandise, unto the said C. D., his executors, administrators and assigns forever.

Provided, nevertheless, that if I, the said A. B., my executors, administrators or assigns, or any of them do and shall well and truly pay unto the said C. D., his executors, administrators or assigns, the sum of _____, with legal interest for the same, on or before the _____ day of _____, then these presents and every clause, article and thing herein contained shall cease and be void; otherwise to be in full force.

In witness whereof the said parties to these presents have interchangeably set their hands and seals hereunto. Dated this day and year first above written.

[Signatures of witnesses.]

[Signatures.] [SEALS.]

NOTE—PROMISSORY—GENERAL FORM.

\$_____. WASHINGTON, D. C., _____, 18_____
_____ days after date, for value received, I promise to pay to P. E. or bearer (or order) _____ dollars.

[Signature.]

NOTE—PROMISSORY—GUARANTY.

[To be Indorsed on Note.]

For value received I guarantee the payment (or collection, or collectibility) of the within note.

_____, 18____

[Signature.]

NOTE—PROMISSORY—JUDGMENT.

[Common Form, With Waiver.]

\$_____. MONTPELIER, Vt., _____, 18_____
_____ after date _____ promise to pay _____ or order, _____ dollars, with interest at the rate of _____ per cent per annum from maturity until paid, and without defalcation. And _____ do hereby confess judgment for the above sum with interest and costs of suit, a release of all errors and waiver of all rights to inquisition and appeal, and to the benefit of all laws exempting real or personal property from levy and sale.

[Signature.] [SEAL.]

NOTE—PROMISSORY—ON DEMAND.

\$_____. BUFFALO, N. Y., _____, 18_____
On demand I promise to pay P. E. or order (or bearer) _____ dollars, for value received.

[Signature.]

NOTE—PROMISSORY—PAYABLE AT A PARTICULAR PLACE.

\$_____. RICHMOND, VA., _____, 18_____
_____ days after date I (or we, or either of us, or we jointly or severally) promise to pay to the order of P. E. at the _____ Bank in _____ (or other place, designating it) _____ dollars with interest. Value received.

[Signature.]

PARTNERSHIP—CONTRACT.

[General Form.]

This agreement, made and entered into by and between A. B., C. D., E. F. and G. H., witnesseth:

That said A. B., C. D., E. F. and G. H. shall associate themselves together in the trade of buying, wholesaling and retailing all sorts of goods, wares and merchandise belonging to the trade and business of

That said partnership shall continue from the date of this agreement for and during the term of ten years next ensuing.

That to this end and purpose the said A. B. has contributed as stock the sum of one thousand dollars; and said C. D. the sum of one thousand dollars; and the said E. F. the sum of one thousand dollars; and the said G. H. the sum of one thousand dollars; to be used and invested, and employed in common between them to their general advantage in the management of said business.

That said parties shall not at any time hereafter use, follow, or exercise said business or occupation, or any other, during said term, to their private benefit or advantage, but shall, at all times during said term, with their utmost skill and ability, conduct and act only for their mutual advantage with said stock and for its increase.

That said parties shall discharge all rents and expenses of said business equally between them.

That all profit, gain and increase that shall arise by reason of said joint business shall be equally divided between them share and share alike.

That all losses and decrease that shall happen in said business, by reason of bad debts, or otherwise, shall be borne and paid equally between them share and share alike.

That there shall be kept, during said term and joint business, just and true books of account, wherein each of said parties shall enter and set down the money by him received and expended, the goods and merchandise by him bought and sold, and all matters and things concerning said partnership, so that either of said partners may at any time have free access thereto.

That said partners shall once every three months, upon the request of any of them, make and render to each other, or to his legal representatives, a true and perfect account of all profit and gains by them made and of all losses sustained; and also of all receipts, disbursements and other things whatsoever concerning said partnership, and thereupon shall cancel, adjust, pay and deliver unto each other their equal shares of the profit so made if any.

That at the end of said term of ten years if said partnership be not sooner determined, in which case the said partners or their survivors shall make a final and true account of all things aforesaid, and in all things well and truly adjust the same.

That upon making such account of stock, goods, wares and merchandise, and the profit, gain and increase thereof which remain the same shall be equally divided between them or their survivors share and share alike.

In witness whereof we have hereunto set our hands this day of .
[Signatures of witnesses.]

A. B.
C. D.
E. F.
G. H.

PARTNERSHIP—NOTICE OF TERMS OF.

[Partnership Notice.]

Notice is hereby given that A. B., C. D., E. F. and G. H. as partners, under the name (or firm) of B. and D. will, on the day of , commence the business of , and on the day of , said partnership will terminate.

The names of the general partners and their respective places of residence are as follows:
A. B., county, State of ; C. D., county, State of .

The names of the special partners and their respective places of residence are as follows:
E. F., county, State of , and G. H., county, State of .

The amount of the capital which each of said special partners has contributed to the common stock of said partnership is as follows: E. F., dollars, and G. H., dollars.
Date , [Official Signature.] [SEAL.]

State of , county, ss.

P. P. being duly sworn, says that he is the printer of (or is in the employ of J. K., the printer of) the , a newspaper published in , and of general circulation in said county; and that the notice, of which the annexed is a true copy, was published for consecutive weeks in said newspaper, commencing on the day of . P. P.

Subscribed to and sworn to before me, this day of .
[Official Signature.] [SEAL.]

PARTNERSHIP—NOTICE OF DISSOLUTION.

[Dissolution of Partnership.]

The partnership heretofore existing under the name of B. & D. wherein A. B., of county, State of , and C. D., of county, State of , were general partners, and E. F., of county, State of , and G. H., of county, State of , were special partners, is this day of , A. D. , dissolved by mutual consent.

The affairs of the firm will be adjusted by C. D. at , etc.

A. B.
C. D.
E. F.
G. H.

POWER OF ATTORNEY—GENERAL.

Know all men by these presents: That I, A. B., of _____, have made, constituted and appointed, and by these presents do make, constitute and appoint C. D. of _____, my true and lawful attorney in fact, for me, and in my name, place and stead, to (here insert the power conferred). That I give unto my said attorney full power to do every thing whatsoever requisite and necessary to be done in the premises, as fully as I could if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney shall lawfully do, or cause to be done, by virtue hereof.

In witness, whereof I hereunto set my hand this _____ day of _____ [Signature.]

PROTEST—GENERAL FORM.

[Copy of Bill (or Note) and Indorsement, etc.]

United States of America, State, (commonwealth, or territory, etc.), _____ county, ss.
On _____ day of _____, A. D., at the request of A. B., the holder of the original bill of exchange (or promissory note) of which the above is a true copy, I, N. P., a notary public in and for said county of _____, presented the same to D. E., the drawer (or maker) therein named, (or if payable at a particular place, say at _____, in said State, (commonwealth, or territory) and demanded acceptance (or payment) thereof, which was refused. Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do solemnly and publicly protest, as well against the drawer (or maker and indorsers) of the said bill (or note) as against all others whom it does or may concern, for exchange or re-exchange, and all costs, damages and interest accrued, and to be hereafter incurred for want of acceptance (or payment) of the same:

And on the same day I served due notice of the protest aforesaid upon the following named persons by depositing such notice in the post-office at _____, in said State (commonwealth or territory) in a sealed envelope, with the postage prepaid addressed to said as follows:

A notice for _____, directed to _____.
A notice for _____, directed to _____.
In testimony whereof I have hereunto set my hand and affixed my notarial seal, the day and year aforesaid.

Protest fees _____ dollars.

[Signature of Notary Public.]
[NOTARIAL SEAL.]

RECEIPT—ACCOUNT GENERALLY.

\$_____. Received of A. B. the sum of _____ dollars on account (for _____). HOLYOKE, MASS., _____, 18_____. [Signature.]

RECEIPT—IN FULL OF ALL DEMANDS.

\$_____. Received of A. B. the sum of _____ dollars in full of all demands against him. ALBANY, N. Y., _____, 18_____. [Signature.]

RECEIPT—INTEREST.

Received this _____ day of _____, of C. D. _____ dollars in full, for one year's interest of one thousand dollars, due me the _____ day of _____, on a bond of said C. D. dated the _____ day of _____.

[Signature.]

RECEIPT—RENT.

\$_____. Received of A. B. the sum of _____ dollars, one month's rent due this day for dwelling house _____ in _____ Street, in _____ St. Louis, Mo., _____, 18_____. [Signature.]

WILL—REAL AND PERSONAL ESTATE.

I, A. B., of the town of _____, in the county of _____, State of _____, (merchant), declare this to be my last will and testament.

1. I give and bequeath to my wife, C. B., _____ dollars, to be used by her in lieu of dower.
2. To my son, E. B., _____ dollars, (which said several legacies I direct to be paid within _____ after my decease).
3. I give and devise to my son, E. B., aforesaid, his heirs and assigns, all (here designate property), together with all the hereditaments and appurtenances thereunto belonging or in any wise appertaining; to have and to hold the premises above described to the said E. B., his heirs and assigns forever.

4. I give and devise all the rest, residue and remainder of my real property, of every name and nature whatsoever, to my said daughter, M. B., and my daughter, O. B., to be divided equally between them, share and share alike.

5. I give and bequeath all the rest, residue and remainder of my personal property, of what nature or kind soever, to my said wife, C. B.

6. I hereby appoint E. B. the sole executor of this will, revoking all former wills by me made.

In witness whereof I, (*name of testator*), have to this my last will and testament, consisting of _____ sheets of paper, subscribed my name (and set my seal) this _____ day of _____, 18____.

Subscribed by the testator in the presence of each of us (or acknowledged by the testator to each of us to have been subscribed by him), and at the same time declared by him to us to be his last will and testament, and thereupon we, at the request of the testator, sign our names hereto as witnesses, this _____ day of _____, 18____, at _____.

[Signature, with seal.]

[Signature and addresses of witnesses.]

SPECIAL CLAUSES TO BE INSERTED IN A WILL IF DESIRED.

[For Pecuniary Legacy.]

I bequeath to my said wife the sum of _____ dollars, (to be paid to her within month after my death.)

[For Legacy of Debt.]

I bequeath to A. B. any debt which at the time of my decease shall be owing from him to me, together with any interest then due thereupon.

[For Legacy of a Share under another Person's Will.]

And whereas under the will of (*name*) I am entitled to a _____ share in his residuary personal estate, I bequeath the said share to (*name*.)

[For Bequest of the Good Will of a Business.]

I give and bequeath the good will and benefit of the business of _____ which I am now carrying on at _____, and also all my capital and property which shall be employed therein at my decease, and also the leasehold premises situate and being No. _____, at _____, aforesaid, wherein the said business is now being carried on, for all my term and interest therein unto my son _____, absolutely.

[For Legacies to Executors.]

And I do hereby nominate and appoint the said C. D. and E. F. executors of this will. And I bequeath to such of them as shall act in the execution of this my will the sum of _____ dollars apiece.

[Bequest to a Corporation.]

I give and bequeath to (*stating if possible the full name of the corporation, or, if not certainly known, describing it*), at _____, the sum of _____ dollars, shall be applied to the uses of said Society, (or college, or otherwise. *Any particular object, such as the endowment of a professorship, may be here stated*).

[For Direction that Legacies shall be Paid Free from Duty.]

And I direct that all legacies given by my said will, or any codicil thereto, shall be paid free from legacy, duty or tax.

[For Declaration that Money Advanced by the Testator during his Life to his Children shall be Deducted from their Portions or Shares of his Estate.]

I declare that all such moneys as I have or shall have advanced to any of my said children, or as shall be owing to me from any of them at my decease, shall be considered as part of my residuary estate, and shall be deducted from his, her or their respective shares.

[Direction as to Payment of Annuities.]

And I direct that the said annuity of _____ dollars to be paid, clear of all deductions, except legacy, duty, or tax, by equal half-yearly payments, the first payment to be made at the end of six calendar months from my death.

[Devise to Executors in Trust, with Power to Sell, etc.]

I give and devise all my real and personal estate, of what nature or kind soever, to C. D. and E. F., my executors hereinafter appointed, in trust, for the execution of my will, with power to sell and dispose of the same, at public or private sale, at such times, and upon such terms, and in such manner as to them shall seem meet. (Provided, however, that no part of my real estate shall be sold until after the expiration of _____ years from my decease.)

WILL—CODICIL TO—GENERAL FORM.

[Revoking several Legacies.]

Whereas I, A. B., of _____, have by my last will and testament in writing, duly executed, bearing date, etc., given and bequeathed to, etc.

Now I, the said A. B., being desirous of altering my said will in respect to the said legacies, do therefore make this present writing, which I will and direct to be annexed as a codicil to my said will, and taken as part thereof; and I do hereby revoke the said legacies by my said will given to _____, and I do give to each of them the said _____ and _____, the sum of _____ dollars only; and I give unto _____ etc.

And I do ratify and confirm my said will in everything, except where the same is hereby revoked and altered as aforesaid.

In witness whereof I have hereunto set my hand this _____ day of _____ 18—

Subscribed by the testator in the presence of each of us (or acknowledged by the testator to each of us to have been subscribed by him), and at the same time declared by him to us to be a codicil to be annexed to his last will and testament, and thereupon we, at the request of the testator, sign our names hereto as witnesses, this _____ day of _____, 18____, at _____.

[Signature, with or without seal.]

[Signatures of witnesses.]

GLOSSARY.

A.

Ad flum aquæ.—To the middle of the stream.

Ad damnum.—To the damage.

ADJUDICATION.—The act or process of trying and determining judicially.

Ad quem.—To which.

A fortiori.—With stronger reason.

AGISTER.—One who takes in cattle and horses to pasture at a certain rate.

Aliunde.—From another place.

ANCILLARY.—Auxiliary.

Ante.—Before.

APPELLANT.—One who removes a cause from a lower to a higher tribunal.

APPELLEE.—The defendant in an appeal.

ASSIGNEE.—A person to whom an assignment is made.

ASSIGNOR.—A person who transfers an interest.

ASSUMPSIT.—A contract or promise, express or implied, oral or written, not under seal, founded on a consideration.

B.

Bona fide.—In good faith; in reality.

C.

Caveat emptor.—Let the buyer beware.

Caveat venditor.—Let the seller beware.

Cestui que trust.—He who is the real and beneficial owner of property held in trust.

CHATTEL.—Every kind of property except real estate.

CHOSE.—A thing personal property.

Consensus facit legem.—Consent makes the law. A contract is law between the parties having received their consent.

CONSIGNEE.—The person to whom goods or other things are delivered in trust for sale or superintendence.

CONSIGNOR.—One who sends, delivers or commits goods or other things in trust to another for sale or superintendence.

Consuetudo debet esse certo.—A custom ought to be certain.

COMITY.—The extension of civilities to communities.

COMPLAINANT.—One who commences a legal process by a complaint.

Cum onere.—With the burden.

D.

De facto.—From the fact.

De jure.—From the law.

Delegatus non potest delegare.—A delegate or deputy cannot appoint another.

Dicta.—Opinions but not adjudications.

DEMURRER.—A stop or pause by a party to an action for the judgment of the court on any question as to the truth of the matter alleged by the opposite party.

Descriptio personae.—Description of the person.

Donatio causa mortis.—Gift in anticipation of immediate death.

DURESS.—Personal restraint or fear of personal injury or imprisonment.

E.

EASEMENT.—A liberty, privilege or advantage without profit, which one proprietor has in the estate of another proprietor, distinct from the ownership of the soil, as a way, water-course, etc.

ENURE.—To serve to the use or benefit of.

EQUALITY is equity.

EQUITIES.—Fair claims.

EQUITY follows the law.

“ looks upon that as done which ought to be done.

“ suffers not a right without a remedy.

ESTOPPEL.—A stop.

Et al.—And others.

Et seq.—And the following.

Ex æquo et bono.—Agreeably to what is good and right.

Ex delicto.—From the crime.

Ex mero motu.—Of his own accord.

Ex necessitate.—From the necessity.

Ex nihilo nihil fit.—From nothing nothing comes.

Ex nudo pacto non aritur actio.—No action arises on a contract without a consideration.

Ex parte.—One side only.

F.

Fiat justitia ruat cælum.—Let justice be done though the heavens fall.

FIDUCIARY.—One who holds a thing in trust for another.

Fi fa.—That you cause to be done.

Frans est celare fraudem.—It is a fraud to conceal a fraud.

G.

GARNISHMENT.—Legal notice to one to appear and give information to the court on any matter.

GRANTEE.—The person to whom a grant is made.

GRANTOR.—The person by whom a grant is made.

H.

Habendum.—One of the formal parts of a deed; its office is to limit or define the estate granted. Is so called because it begins with the words "to have."

I.

Id certum est quod certum reddi potest.—That is certain which may be rendered certain.

Ignorantia excusatur, non juris sed facti.—Ignorance of fact may excuse, but not ignorance of law.

Impotentia excusat legem.—Impossibility is an excuse in law.

Incolas domicilium facit.—Residence creates domicile.

Index animi sermo.—Speech is the index of the mind.

Indicia.—Discriminating mark; signs.

INDORSEE.—The person to whom a note or bill is indorsed or assigned by indorsement.

INDORSER.—The party by whom a note, bill or check is indorsed.

In fra.—Below.

In ipsis verbis.—In this language or words.

Injurio non prasumitur.—A wrong is not presumed.

IN LIEU.—Instead.

In pais.—Matter of fact as distinguished from that of record.

In personam.—In person.

In praesenti.—At the present time.

In propria causa nemo judex.—No one can be judge in his own cause.

In re.—In the matter of.

In rem.—Against the thing or property.

Inter alia.—Among other things.

In terrorem.—As a warning.

Inter sese.—Among themselves.

Inter vivos.—Between the living.

In toto et pars continetur.—A part is included in the whole.

In transitu.—On the passage.

INURE.—See Enure.

J.

J.—Judge.

Judicis est jus dicere non dare.—It is the duty of a judge to declare the law not to enact it.

Juratores sunt judices facti.—Jurors are the judges of the facts.

Juro publico antefерendo privatis—Public rights are to be preferred to private.

L.

Lata culpa dolo aequiparatur.—Gross negligence is equal to fraud.

LAW construeth every act to be lawful when it standeth different, whether it be lawful or not.

LAW construeth things according to common possibility or intendment.

LAW construeth things to the best.

“ “ “ with equity and moderation.

“ disfavoreth improbabilities.

“ favoreth charity.

“ “ common right.

“ “ diligence, and therefore, hateth folly and negligence.

LAW favoreth honor and order.

“ “ justice and right.

“ “ life, liberty, and dower.

“ “ mutual recompense.

“ “ possession where the right is equal.

“ “ public commerce.

“ “ “ quiet.

“ “ speeding men's causes.

“ “ things for the commonwealth.

“ “ truth, faith, and certainty.

“ hateth delays.

“ “ wrong.

“ hath new inventions and innovations.

“ of itself prejudiceth no man.

“ respecteth matter of substance more than matter of circumstance.

LAW respecteth possibility of things.

“ “ the bonds of nature.

LAWFUL things are well mixed unless a form of law oppose.

Le contrat fait la loi.—The contract makes the law.

Leges humanae nascuntur vivunt et moriuntur.—Human laws are born, live and die.

Leges posteriores priores contrarias abrogant.—Subsequent laws repeal prior conflicting ones.

Lex domicilii.—Law of residence.

Lex loci rei sitæ.—The law of the place of situation of the thing.

Lex succurit ignoranti.—The laws succor the ignorant.

Lex uno ore omnes alloquitur.—The law speaks to all with one mouth.

Lex vigilantibus non dormientibus subvenit.—Law assists the wakeful not the sleeping.

LIEN.—Legal claim.

Locus contractus regit acture.—The place of the contract governs the act.

Locus penitentiae.—Place for repentance.

Longa possessio est pacis jus.—Long possession is the law of peace.

M.

Magna culpa dolus est.—Great neglect is equivalent to fraud.

Melior est causa possidentis.—The cause of the possessor is preferable.

MESNE.—A process or action introduced into a suit or intervening between the beginning and end of a suit.

Mobilia personam sequuntur, immobilia situm.—Movable things follow the person; immovable their locality.

Mobilia sequuntur personam.—Movables follow the person.

Mors omni solvit.—Death dissolves all things.

MORTGAGEE.—The person to whom a mortgage is made or given.

MORTGAGOR.—The person who conveys real property as security for debt.

N.

Necessitas est lex temporis et loci.—Necessity is the law of a particular time and place.

Ne exeat.—Let him not depart.

Nemo præsimitur molus.—No one is presumed to be bad.

Nihil dat qui non habet.—He gives nothing who has nothing.

Nisi.—Unless.

Non est.—Is not.

Non facias malum ut inde veniat bonum.—You are not to do evil that good may come of it.

Non est regula quin fallat.—There is no rule but what may fail.

Nudum pactum.—A mere agreement; a contract made without any consideration and therefore void.

NUGATORY.—Of no force, ineffectual.

Nulla bona.—No goods.

Nullus commodum capere potest de injuria sua propria.—No one shall take advantage of his own wrong.

O.

Obiter.—An opinion expressed by a court, but which not being necessarily involved in the case, loses the force of an adjudication.

Omne quod inædificatur solo credit.—Every thing belongs to the soil which is built upon it.

Omnis consensus tollit errorem.—Every consent removes error.

Onus.—The burden.

Optima enim est legis interpretres consuetudo.—Usage is the best interpreter of law.

P.

Per capita.—By the head.

Per contra.—Contrariwise.

Per stirpes.—Root of a race.

Post.—After.

PREPONDERANCE.—An outweighing, superiority of weight.

Prima facie.—On the first view.

Prior tempore potior jure.—He who is first in time is preferred in right.

Probandi necessitas incumbit illi qui agit.—The necessity of proving lies with him who sues.

Proces verbal.—A written statement.

Pro rata.—According to the rate or proportion.

Pro tanto.—For so much.

Q.

Quod ad jus naturale attinet omnes homines æquales sunt.—All men are equal as far as the natural law is concerned.

Quo warranto.—An ancient writ still in use directed against any person or corporation who usurp any office, franchise, or liberty calling upon them to show by what authority they support their claim.

R.

Ratihabitio mandato æquiparatur.—Ratification is equal to command.

REFEREE.—A person to whom has been referred a matter in dispute in order that he may settle it.

REPLEADER.—A second pleading or course of pleadings.

REPLEVIN.—To take or get back by a writ for that purpose goods wrongfully taken and retained.

Res denominatur a principaliori parte.—A thing is named from its principal part.

Res gestæ.—The subject-matter.

RESPONDENT.—One who answers in certain suits on appeal.

Respondentia.—Shipping contract given as security on goods for loan of money.

S.

Scientia utrius que par pares contrahentes facit.—Equal knowledge on both sides makes the contracting parties equal.

SCIENTER.—Knowingly.

Scintilla.—An iota; the least particle.

Scribere est agere.—To write is to act.

Scire facias.—Cause it to be known.

Semper sexus masculinus etiam fac minimum continet.—The male sex always includes the female.

Servitia personalia sequuntur personam.—Personal services follow the person.

Sui generis.—Of its own kind.

Supra.—Above.

T.

Tantum non est quantum verdi passunt.—Things are worth what they will sell for.

Testamenta latissimam interpretationem habere debent.—Wills ought to have the broadest interpretation.

TORT.—A form of action for a wrong or injury.

Traditio loqui facit chartum.—Delivery makes the deed speak.

TROVER.—An action to recover damages against one who found goods, and would not deliver them to the owner on demand.

U.

Ubi supra.—Where above mentioned.

Ultra vires.—Beyond authority in case of corporations.

Usus est dominium fiduciarum.—A use is a fiduciary ownership.

V.

VENDEE.—The person to whom a thing is sold.

VENDOR.—Seller.

Venire facias de novo.—A new writ to correct error.

Verba intentioni, non e contra debent inservire.—Words ought to be made subservient to the intent, not contrary to it.

VERBATIM.—In the same words.

Vire et uxor consentur in lege una persona.—Husband and wife are considered one person in law.

Virtute officii.—By virtue of office.

Vis legibus est inimica.—Force is inimical to the laws.

Volenti non fit injuria.—He who consents cannot receive an injury.

Voluntas reputabatur pro facto.—The will is to be taken for the deed.

W.

WAIVES.—Abandons; forsakes.

When no time is limited, the law appoints the most convenient.

When the common law and statute law concur, the common law is to be preferred.

When the foundation fails, all fails.

When the law gives any thing, it gives a remedy for the same.

When the law presumes the affirmative, the negative is to be proved.

When two titles concur, the best preferred.

Where there is equal equity, the law must prevail.

Where two rights concur, the more ancient shall be preferred.

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